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### *The Law of Aviation*

The lawyer with imagination must feel somewhat as an astronomer who sees "a new planet swim within his ken" when an entirely new field for the application, perhaps even the creation, of legal principles arrives in the course of human progress. Such a field, at least to a great extent, is that furnished by the development of aviation. In recognition of the importance of the subject, the American Bar Association some time since appointed a special committee on the Law of Aviation, with Charles A. Boston of New York as Chairman, and this committee has recently submitted its first preliminary report to the Executive Committee. It emphasizes the fact that it is furnished for information only and to invite additional information and suggestion from those interested in the subject matter, and that it is not to be deemed the action of the American Bar Association, nor of its Executive Committee, nor the definitive or final report of the special committee.

The report, in fact, concerns itself principally with stating the problems to be settled, as brought out by various suggestions made to the Chairman as a result of a fairly extensive correspondence with those competent to speak upon the subject. These questions, of course, deal with the advisability of unified Federal regulation and supervision, with the powers to be given to any Federal Department that is established, with the serious embarrassment to national regulation growing out of the dual nature of the government, with the absence of any grant of express power over the general subject of aviation in the Constitution of the United States, and other cognate subjects. It contains a long list of publications respecting the law of aviation which should prove valuable.

The full membership of the committee is as follows: Charles A. Boston, New York City, Chairman; Orrin H. Carter, Chicago, Ill.; William P. Bynum, Greensboro, N. C.; George G. Bogert, Ithaca, N. Y.; William P. McCracken, Chicago, Ill.

### *State Administrative Reorganization*

The movement for administrative reorganization in the states has scored another advance. On January 23 Washington passed a new administrative code which went into effect April 1. While the features of the state reorganization bills that have been passed in recent years naturally vary, due in differing degrees to constitutional, institutional, political and social influences, yet the general principles on which such reorganizations should be based have been fairly well established and are generally recognized.

These are pointed out in an interesting supplement to the National Municipal Review issued in November, 1919. The consolidation plans now in operation in Illinois, Idaho and Nebraska illustrate them fairly well. The essential features are: grouping the existing administrative agencies mainly upon a functional basis, work of a related or allied nature being brought together; reduction of the number of administrative departments to the minimum consistent with the general lines of functional grouping; full responsibility by one person for the administrative work of each department—though in the Massachusetts plan, for instance, there is considerable deviation from this principle; no longer tenure of office for department heads and other administrative officers than for the governor, in order to secure responsibility to the executive; provisions for the establishment of an executive budget system.

### *Ideals and Service*

While the maintenance of a high standard of professional ethics rightfully remains in the forefront of the program of the State Bar Associations, there

is to be noted in them a wise tendency to extend the field of practical usefulness of such organizations to the members as far as possible. And in this close contact of the local associations with the immediate needs of the lawyer in his every-day work is to be found not only an added element of usefulness but also further assurance that the ethical principles which these associations represent will be applied more and more definitely to actual facts and problems.

An interesting illustration of the addition of service to ideals by a State Bar Association is furnished by the legislative service which has recently been instituted by the Pennsylvania State Association. This service, which is sent to every member of that body, gives a complete synopsis of the progress of legislation from day to day. Members are informed when every bill is introduced, what its subject matter is, by whom introduced, what committee it is referred to, and so on until final disposition. This cannot fail to be valuable to a large percentage of the members of the organization, since there are few lawyers who have not a direct or indirect interest in some legislative effort during the course of a session. Mr. Harold B. Beitler is the Secretary of the Association which has undertaken this enterprise.

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### *Massachusetts Judicature Commission Report*

The second and final report of the Massachusetts Judicature Commission, appointed to suggest plans for the improvement of the judicial system of that state, has been made. The basis on which the Commission worked is stated in the introduction to have been a recognition of the fact that the courts are, as said by Mr. Justice Riddell of the Supreme Court of Ontario in an address at Boston to the American Bar Association, "a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money."

An examination of the various recommendations of the Commission shows that while the familiar principles of judicial reorganization have been well kept in mind, that body did not deem it wise to ignore the habits and various other factors resulting from the historical development of the judicial system of the state, as well as the public attitude thereto.

On the subject of unification of the courts it declined to recommend a general reconstruction, but stated that it believed there were various ways in which "the substantial part of the existing judicial structure can be gradually adjusted without very radical changes to the growing demands of the work required of it." It recommended that certain proposed arrangements for the consolidation of present judicial functions be given careful study and consideration, bearing in mind, however, that "all fundamental improvement is better attained by a gradual process rather than by a sudden change."

It recommended that there should be a judicial council for the continuous study of questions relating to the courts. This body, in its opinion, should consist partly of judges and partly of members of the bar, with the Chief Justice of the Supreme Court as the head of the judicial system of the state, or some other member of that court delegated by him, as its presiding officer. The members should serve without compensation, but should be provided with the necessary clerical assistance and given an efficient executive secretary, at an adequate salary, to collect information and prepare the material for their consideration. It should not be given rule-making powers. Its functions should be those of a permanent judiciary commission, with authority to investigate and with the duty of submitting an annual report to the governor.

On the subject of giving the courts full rule-making powers it expresses the opinion that the Massachusetts Practice Acts and the broad rule-making power which has existed for many years in the Supreme Judicial Court and the Superior Court furnish a method of procedure which has proved fairly satisfactory.

"While there are certain provisions in our statutes relating to practice which restrict the action of our courts," it says, "and in our opinion should be repealed or altered as suggested elsewhere, yet we think it wiser that such changes should be made by the Legislature after public discussion based upon the suggestions made in this report, or future studies by a judicial council, than that the entire responsibility should be thrown upon the courts in addition to their other burdens under the existing organization and arrangement for the division of work."

It declines to recommend the creation of a court of domestic relations as that, in addition to objections to creating any more separate courts, would involve a very considerable reorganization. It believes the matter, however, to be worthy of future study. It suggests that the name "Police Court" should be changed to "District Court," on the ground that it is not a good name for any court having civil jurisdiction.

It recommends the enlargement of the concurrent jurisdiction of the Superior Court to cover most of the subjects of which the Supreme Judicial Court now has exclusive jurisdiction, and also a provision enlarging the powers of the Justices of the Supreme Judicial Court to transfer cases to the Superior Court for hearing in whole or in part. This, of course, with the idea of relieving the pressure on the highest court in the state. It believes, however, that it would be a serious mistake to enlarge the membership of this highest court. It states:

> The court has stood as a small court for over one hundred and forty years, and as such, with the longest continuous existence of any court in the country, it has acquired a deep seated respect and prestige in the minds of the people of Massachusetts, which we believe to be one of the greatest elements of strength and value in the government of the Commonwealth in the interests of all its people.

It also recommends that it be provided that a Justice of the Superior Court can be called upon to sit in the Supreme Judicial Court to hear certain cases in the first instance in that court when his assistance is regarded as advisable. It further recommends the passage of a Declaratory Judgment Act.

With regard to admissions to the bar, it recommends that this matter should be left to the regulation of the Justices of the Supreme Judicial Court with the assistance of the Bar Examiners and that they should be trusted to regulate it in the interest of the public as they are trusted with all their other important duties. There are various other recommendations which may be read with profit by one who is interested in the subject.

# PRESIDENTIAL GOVERNMENT

## An Inquiry as to the Relative Importance of Congress and the President Today, as Compared with Former Times

By Henry P. Chandler
*Of the Chicago Bar*

THE recent inauguration of another President of the United States suggests a consideration of the presidential office. Is the President of today the official contemplated by the constitution? If not, how does he differ? How does he compare with Presidents of earlier periods? What is the relative importance of Congress and the President today as compared with former times? If the distinguished scholar as well as statesman who lately relinquished the presidency, were again to write a critique of the national government, would he be obliged in fairness to entitle it "Presidential Government" rather than "Congressional Government," as in the brilliant treatise with which he challenged the attention of thoughtful men in 1884? These are natural questions.

It is certainly the general impression that the office of President has been greatly enlarged in recent times. Woodrow Wilson's own writings indicate the changes in view within a generation. The first edition of "Congressional Government," as the title indicates, set forth the paramountcy of Congress. In it the author said in reference to the federal government, that "the predominant and controlling force, the centre and source of all motive and of all regulative power, is Congress."

When the fifteenth edition was issued in 1900, the Spanish War had been fought, and with the acquisition of Hawaii and the Philippine Islands, America had been drawn into the current of world tendencies. The author was then not so sure of the supremacy of Congress. In the preface to this edition he said:

> When foreign affairs play a prominent part in the politics and policy of a nation, its executive must of necessity be its guide, must utter every initial judgment, take every first step of action, supply the information upon which it is to act, suggest and in large manner control its conduct.

Also:

> It may be, too, that the new leadership of the executive, inasmuch as it is likely to last, will have a very far-reaching effect upon our whole method of government. It may give the heads of the executive departments a new influence upon the action of Congress. It may bring about as a consequence, an integration which will substitute statesmanship for government by mass meeting.

Then he adds, very candidly, "It may put this whole volume hopelessly out of date."

Eight years later, virtually at the end of Roosevelt's administration, when Woodrow Wilson brought out his book entitled "Constitutional Government in the United States," his surmise as to the growing power of the executive seems to have been confirmed. In it he says:

> Greatly as the practice and influence of Presidents has varied, there can be no mistaking the fact that we have grown more and more inclined, from generation to generation, to look to the President as the unifying force in our complex system, the leader both of his party and the nation.

What was stated as a fact in the passages quoted, was condemned in the last campaign by the gentlemen who is now President, as a subversion of the constitution. In his speech of acceptance of the Republican nomination Senator Harding said:

> No man is big enough to run this great republic. There never has been one. Such domination was never intended.

Also:

> It was not surprising that we went far afield from safe and prescribed paths amid the war anxieties. There was the unfortunate tendency before; there was the surrender of Congress to the growing assumption of the executive before the world war imperiled all the practices we had learned to believe in (whether referring only to the first administration of Wilson or also to the methods of Roosevelt is not clear), and in the war emergency every safeguard was swept away. In the name of democracy we established autocracy * * *. Our first committal is the restoration of representative popular government.

Do not pronouncements like these make it pertinent to examine the methods of our recent executives, Roosevelt and Wilson, in whose hands the presidential office has been magnified, and range them alongside the opinions of the makers of the constitution and the practices of some of the earlier Presidents? Have these late statesmen made an innovation in the presidency or not? My conclusion, the grounds of which I shall explain, is that they have not; that they were masterful Presidents, but there have been masterful Presidents before; that if latterly Roosevelt insisted upon a liberal construction of the presidential powers, Taft still later stood for a strict construction and Harding may; that from the very beginning some Presidents have been aggressive in their conduct of the office and others more or less passive; that the difference between them is a matter not of chronology but of the personality of the incumbents and the circumstances of their terms; and that, finally, presidential leadership, instead of being reprehensible, is to be welcomed.

Now for a consideration of the methods of Roosevelt and Wilson. Roosevelt secured much in the way of progressive legislation, as witness the amendment of the Interstate Commerce Act, giving the Interstate Commerce Commission power effectually to fix rates and prevent rebates, and the law creating the department of commerce and labor with a bureau of corporations and taking the first step toward the federal regulation of corporations. But many of the achievements by which he will be remembered and perhaps the most typical were accomplished with little aid from legislation.

It was characteristic of Roosevelt that when he saw an opportunity for service he asked not whether the law authorized it, but whether there was any law to forbid it. If not he undertook it without hesitation. Take for example the anthracite coal strike in 1902. Roosevelt recognized that there was no legal basis for federal intervention because, unlike the situation in the Pullman strike in 1894, there was no interference with interstate commerce, or the carriage of the mails, and there was no violence which led the local authorities to call for federal aid. In his address to the conference of operators and representatives of the miners

in Washington the President was frank on this point. He said:

> I disclaim any right or duty to intervene in this way upon legal grounds or upon any official relation that I bear to the situation.

But there was a danger to be faced, and to meet it he did not shrink to adventure beyond the letter of his duty. He continued:

> The urgency and the terrible nature of the catastrophy impending over a large portion of our people in the shape of a winter fuel famine impel me, after much anxious thought, to believe that my duty requires me to use whatever influence I personally can, to bring to an end a situation which has become literally intolerable.

His earnest insistence supported by public opinion ultimately prevailed. Settlement by arbitration was effected. In commenting upon it, the London Times said:

> In a most quiet and unobtrusive manner the President has done a very big and entirely new thing. We are witnessing not merely the ending of the coal strike, but the definite entry of a powerful Government upon a novel sphere of operation.

Now the intervention of the President or his Cabinet in any strike of national import is taken as a matter of course.

Instances of Roosevelt's willingness to accept responsibility independent of Congress might be multiplied.

In the winter of 1904 he learned that it was proposed to introduce a bill for full service pensions of $12 a month for all veterans of the Civil War sixty-two years old or over. Such a bill would have entailed an expenditure of some $50,000,000 a year, but the President was told that if it once got started it could not be stopped, not even by a veto, because members of Congress would not dare to oppose it on roll-call. Then he found that the existing law provided for a pension of $12 a month for complete disability and $6 a month for partial disability, and that it had been established by previous rulings of the Pension Department that the ages of seventy-five and sixty-five should be treated as evidence of complete and partial disability respectively. President Roosevelt by executive order simply reduced the ages to seventy and sixty-two, thereby in effect giving all veterans a pension of $6 a month at sixty-two years and $12 a month at seventy years. This act was denounced as executive usurpation, but it increased the pension roll only $5,000,000 instead of $50,000,000, and it satisfied Congress which was willing enough to save the money for the Government if it did not have to go on record against pensions. The extravagant increase was never brought up.

In August, 1906, while Congress was not in session, an insurrection broke out in Cuba, which the Cuban Government was unable to quell. Entirely on his own responsibility President Roosevelt dispatched ships and a small military force to maintain order. He proclaimed a provisional government with Secretary of War Taft, who went to the scene, as the first Provisional Governor. The insurgent chiefs immediately disbanded their forces and tranquility was restored. Without doubt a less self-reliant President would have preferred to call Congress in special session and obtain its approval before taking such an important step. But of such a policy, the President wrote in a letter to Senator Lodge:

> Of course if I had announced as Mr. Bryan advised, that under no circumstances would I use armed force, or if, as Foraker desires, I had stated I could take no action until Congress decided what to do—just imagine my following the Buchanan-like course of summoning Congress for a six weeks' debate by Bacon, John Sharp Williams, and Tillman as to whether I ought to land marines to protect American life and property—the fighting would have gone on without a break, the whole island would now be a welter of blood.

Then he added what is always the safeguard against any long continued executive action contrary to the popular will:

> Of course our permanent policy toward the island must depend absolutely upon the action of Congress, no matter what construction is given the Platt Amendment. Congress has nothing to do but to refuse appropriations to put it into effect, and the Platt Amendment vanishes into air, and any stay of marines and troops in the island becomes impossible.

In 1905 the President concluded a treaty with Santo Domingo at its request, by which the United States took charge of the collection of customs, and agreed to turn over forty-five per cent of the proceeds to the Dominican government and use the remainder toward the payment of the foreign debts of the country. The President felt that if under the Monroe Doctrine the United States opposed direct action by European nations to collect their debts, it should offer some alternative redress. The Senate adjourned without acting on the treaty. Then the Dominican government asked that President Roosevelt take over the custom-houses pending action by the Senate.

Writing to Secretary Hay, President Roosevelt said:

> I decided to do so, but first of all consulted Spooner, Foraker, Lodge, and Knox. All heartily agreed that it was necessary for me to take this action. * * * I also consulted Gorman, who told me that he had taken it for granted that I would have to take some such action as that proposed and believed it necessary. I understand, however, that this was merely his unofficial opinion, and that officially he is going to condemn our action as realizing his worst forebodings.

Ultimately in the spring of 1907 the treaty was ratified by the Senate with slight amendments which were accepted. Speaking of it at the Harvard Union, President Roosevelt said:

> This arrangement has gone on for two years now, while the co-ordinate branch of the Government discussed whether or not I had usurped power in the matter, and finally concluded I had not, and ratified the treaty. Of the fifty-five per cent that we collected for them, they have collected more money than they ever got when they collected one hundred per cent themselves; and the island has prospered as never before.

With the incident of the Dominican treaty in mind, we can readily appreciate the statement of President Roosevelt in a letter to Mr. Strachey, editor of the London Spectator, in 1906, that "Some of the things the Senate does really work to increase the power of the executive. They are able so effectually to hold up action when they are consulted, and are so slow about it, that they force a President who has any strength to such individual action as I took in both Panama and Santo Domingo * * *. In this nation, as in any nation which amounts to anything, those in the end must govern who are willing actually to do the work of governing; and in so far as the Senate becomes a merely obstructionist body it will run the risk of seeing its power pass into other hands."

The conspicuous elements in the record of Woodrow Wilson as President are his foreign policy and his leadership in legislation. The first I omit to discuss because it is vividly impressed on the minds of all Americans whether they agree with it or disagree. On the second point it is only justice to say that President

Wilson has made a record for constructive laws enacted that will live to his eternal credit. It cannot be explained by the exigencies of war because his first administration was no less fruitful, in fact in measures that will endure was perhaps more fruitful than his second. It was marked by the establishment of the income tax, the federal reserve banking system and legislation to make definite the ban of the anti-trust act against restraints of trade and unfair competition. It seems safe to say that the income tax and the federal reserve system will remain elements of capital importance in the financial organization of the nation far into the future. The leadership of the President which secured them, will, I believe, be rated by historians as statesmanship of the first magnitude. Do you ask how it was done? Was it not by gathering up the public opinion of the country and focusing it upon one desired measure after another with such concentration and firmness of purpose that Congress could not fail to respond? Professor Dodd suggestively says in his study of the President:

> When he was ready to make a new move in Congress, he asked the members of the appropriate committees to meet him for discussion. The result was a matured legislative plan which was generally enacted into law very much as had been suggested. Although he acknowledged that many of his party leaders were far from democratic, he assumed them to be disposed to give democracy a trial. If any of them threatened to be recalcitrant, it was quietly intimated that he would have to "take the matter to the people."

The same methods in the second administration procured from Congress without delay all needful legislation for waging war: the selective service act unparalleled in this country for the expedition and completeness with which the principle of universal military service was applied, the levy of billions of dollars in taxes and the authorization of loans of billions more, the espionage act, the regulation of foodstuffs and fuel, the control and operation of the railroads. No wonder that Professor Dodd characterizes President Wilson in this period as "a master in Washington in spite of the known hostility of a majority of Congress because an American President must always be a master in time of war."

Thus I have tried to suggest if only in the most sketchy fashion, the conception of their office exemplified by Presidents Roosevelt and Wilson, in order that we may have something to compare with the conception of the makers of the constitution and of former Presidents. I have endeavored to recognize in its amplest extent the power wielded by these two late Presidents. Yet I am not convinced that it represents any radical change in our political system.

First as to the constitution. It is, of course, true that the makers of the constitution did not anticipate the complexity and multitude of functions of the modern President any more than they anticipated electricity and railroads. Furthermore it is not apparent that they thought of the initiative in legislation which strong Presidents now exercise. But no one can read the debates of the Constitutional Convention without realizing that it was intended to establish a strong executive who should be free from domination by Congress. In essentials Presidents who today take an expanded view of their office may rightly invoke the constitution.

There was a proposal in the Convention for Congress to select the President. Sherman of Connecticut considered the executive as only an institution for carrying the will of the legislature into effect and therefore urged that he should be appointed by the legislature. But this was not the view of the majority. Gouverneur Morris said, "If the executive be chosen by the national legislature, he will not be independent of it, and if not independent, usurpation and tyranny on the part of the legislature will be the consequence." The controlling reason for the method which was adopted of election of the President by electors, was stated by Madison to be "the indispensable necessity of making the executive independent of the legislature."

It was equally manifest that a strong executive was sought. Randolph of Virginia, fearing executive tyranny, proposed to vest the executive power in three persons drawn from different portions of the country, but Wilson of Pennsylvania advocated a single magistrate as giving more energy, dispatch and responsibility to the office, and the proposal for a single executive was adopted seven states to three. Proposals to join the President with judges in the veto power and again to create a council to act with him in the matter, were defeated eight states to three, although Mason of Virginia said the convention was "about to try an experiment on which the most despotic government had never ventured." Madison moved that two-thirds of the Senate be authorized to make treaties of peace without the concurrence of the President, arguing that the President would derive so much power from a state of war that he might be tempted if authorized to impede a treaty of peace. But this motion was defeated by the Convention.

There were not lacking delegates who feared that the executive was unduly strong. Dickinson of Delaware said that "such an executive as some seemed to have in contemplation was not consistent with a republic, that a firm executive could only exist in a limited monarchy." Mason said: "We are not indeed constituting a British government but a more dangerous monarchy,—an elective one." Benjamin Franklin said: "The executive will be always increasing here as elsewhere till it ends in a monarchy."

But the consensus of opinion was that there was more danger of usurpation by Congress than by the President. Pinckney of South Carolina decided to support the new constitution although "he objected to the contemptible weakness and dependence of the executive." Wilson said that he was most apprehensive of a dissolution of the government from the legislature swallowing up all the other powers. Morris said that it was a maxim of political science that Republican government was not adapted to a large extent of country because the energy of the executive could not reach the extreme parts of it; that this country was an extensive one; and that either the blessings of union must be renounced or an executive provided with sufficient vigor to pervade every part of it. Madison said, in contending against undue dependence by the executive on the legislature, "Experience had proved a tendency in our government to throw all power into the legislative vortex."

The necessity of a strong executive was also urged in the campaign for the adoption of the constitution conducted by the Federalist. In a letter to Trevelyan, the English historian in 1908, Roosevelt assigned a large place to the President. He said:

> I believe that the efficiency of this Government depends upon its possessing a strong, central executive, and wherever I could establish a precedent for strength in the executive, as I did for instance as regards the external affairs in the case of sending the

> fleet around the world, taking Panama, settling affairs of Santo Domingo and Cuba; or as I did in internal affairs in settling the anthracite coal strike, in keeping order in Nevada this year when the Federation of Miners threatened anarchy, or as I have done in bringing the big corporations to book—why, in all these cases I have felt not merely that my action was right in itself, but that in showing the strength of, or in giving strength to the executive, I was establishing a precedent of value.

But this large conception of the executive is paralleled in spirit in the following passage from the Federalist:

> Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks. It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

If the constitution represented a triumph for the exponents of a strong executive, so from the beginning Presidents in practice—not all Presidents but many and all who have left their mark upon history—have taken a large view of their powers. Washington did not immediately assume political leadership. The first revenue bill, providing principally for a moderate tariff on imports, seems to have been enacted mainly through the advocacy of Madison in the House of Representatives without prompting from the President. Moreover the first Cabinet was not adapted for political leadership because Jefferson, Secretary of State, and Hamilton, Secretary of the Treasury, were at opposite poles. When the bill for the first national bank was passed Washington hesitated between them as to whether he should veto or sign it, and only after some delay was persuaded by Hamilton to sign it. The conception of the Cabinet as a unit had not yet taken form.

Nevertheless a number of points of the utmost moment were decided in favor of the executive in Washington's administration. First, it was established that the President had the sole right of removal of executive officers. The decision might easily have been the other way and a precedent established which would hamper the President for all time by denying him the control of his subordinates. The vote in the Senate was a tie, ten to ten, carried in favor of the President only by the casting vote of the Vice-President.

The proclamation of neutrality between France and England in 1793 was another demonstration of the power of the executive. Sentiment for France ran high, and the proclamation was bitterly denounced as unconstitutional, on the ground that it rested with Congress, which had the power to declare war, to determine whether the attitude of this country toward England should be one of war or peace, and the President had no power in the premises. But the proclamation stood.

It would seem that the proclamation might easily have been justified on the principle that peace exists until war is declared and at least pending a declaration of war by Congress, it was the duty of the President to proclaim neutrality toward both belligerents. Hamilton, however, who defended the proclamation writing under the nom de plume of "Pacificus," took broader ground. He declared that while the constitution granted to Congress only specific powers, it vested general executive power in the President. He admitted that some executive powers were specified, like the powers to receive ambassadors, to enforce the laws, to command the army and navy. But he said:

> The enumeration ought * * * to be considered as intended merely to specify the principal articles implied in the definition of executive power, leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the constitution and with the principles of free government. The general doctrine of our constitution then is that the executive power of the nation is vested in the President, subject only to the exceptions and qualifications which are expressed in the instrument.

In Washington's administration the obligation of treaties, morally binding upon Congress, although made by the President with the consent of the Senate, was established. This occurred in connection with the Jay Treaty with England. The treaty was highly unpopular. England made no renunciation of the right of search nor did it concede any rights of trade to Americans in the ports of Canada or the West Indies. The best argument for it was that for the time being it averted war with England. By it the United States undertook to pay certain British claims and an appropriation was necessary to provide the funds. After protracted debate in the House of Representatives during which the issue hung in the balance, a resolution was adopted by a vote of fifty-one to forty-eight that it was expedient to pass the laws necessary to carry the treaty into effect.

Collateral to the main question a resolution had been adopted by a vote of sixty-one to thirty-eight, calling on the President to submit the instructions given to Mr. Jay and his correspondence in reference to the treaty. Compliance with this request would have involved a recognition of the right of the House of Representatives to pass independently on the wisdom of treaties before proceeding to enforce them. But the request was refused. Then by the powerful advocacy of Fisher Ames of Massachusetts a hostile majority was beaten down, and the principle settled which has ever since prevailed that a treaty duly made by the President and Senate becomes a part of the supreme law of the land, to enforce which, whether it agrees with it or not, Congress is in honor bound.

In a debate on the national debt in 1793 an incident occurred seemingly unimportant, but yet significant in pointing thus early toward executive leadership in difficult matters of legislation. It was moved that the Secretary of the Treasury, Hamilton, be asked to furnish a plan for the reduction of the debt. Madison objected. He said that information, not a plan, was what was wanted. He and his friends argued that the House did not come to be schooled and lectured and made to listen to long essays on finance. The House ought to be left to its own unbiased judgment. The Secretary's business was to manage the revenue after it had been collected not before it was ordered. But very sensibly the motion to strike out the part of the resolution calling for a plan was defeated, thirty-one to twenty-five, and guidance was sought from the department and the officer preeminently qualified to give it.

Thus the first administration saw the executive firmly intrenched in power: the absolute right of removal of appointees, the direction of the foreign policy of the nation as in the Neutrality Proclamation, the right to call upon Congress for the enforcement of treaties duly ratified, advice by the executive departments in matters of legislation within their fields, all these points decided in favor of the President. We

hear complaints of executive domination at later periods. But was there ever an administration in which more important gains for the executive were recorded than in this administration immediately following the adoption of the constitution? May not the practical construction then given to the powers of the President be invoked in support of the broad powers exercised by later Presidents down to Woodrow Wilson? It seems to me that it may.

Certainly there is no denunciation of executive prerogative in modern times to which Washington's administration was a stranger. Witness the journal of Maclay, the Antifederalist senator from Pennsylvania in the first Congress. Of the action of the Senate in voting to give the President the sole right of removal, Maclay said: "What avowed and repeated attempts have I seen to place the President above the powers stipulated for him by the constitution?" He referred to the course of the President in occasionally consulting members of the House of Representatives about appointments, as a courtship of that body "that by their weight he may depress the Senate and exalt his prerogatives on the ruins." Of an occasion when the President went before the Senate with a treaty with the Indians recommended by Secretary of War Knox and seemed disappointed that the Senate referred it to committee instead of ratifying it immediately, Maclay said:

> The President wishes to tread on the necks of the Senate. * * * He wishes us to see with the eyes and hear with the ears of his Secretary only. The Secretary to advance the premises, the President to draw the conclusions and to bear down our deliberations with his personal authority and presence.

Brief comment must suffice as to a few episodes in later administrations. Always disposition and circumstance have counted for more than abstract theory in determining the extent of power which Presidents have exercised. Never was a President inclined to construe his powers more strictly than Jefferson. In a message to Congress recounting an engagement between an American frigate, one of a fleet engaged in convoying American ships for protection against pirates, and a Tripolitan vessel, Jefferson explained that the pirate ship had been defeated, and then stripped of masts and ammunition and left helpless. This was defense, but obedient to instructions the American commander had refrained from capturing the vanquished craft because capture would have been an act of war and Congress had not declared war.

These meticulous scruples did not however hold Jefferson back when the opportunity came to acquire Louisiana. When James Monroe was confirmed by the Senate as envoy extraordinary to Spain and France in 1803, the Senate authorized him to purchase the island of New Orleans for $2,000,000. When the treaty came back it provided for the purchase of the entire region of Louisiana, comprising roughly the Mississippi and Missouri valleys for $15,000,000. Of Jefferson's quandary McMaster says in his history that as a strict constructionist Jefferson could not consider the purchase of foreign territory constitutional. But "his common sense got the better of his narrow political scruples, and he soon found a way of escape. He would accept the treaty, summon Congress, urge the House and Senate to perfect the purchase, and trust to the constitution being mended so as to make the purchase legal." The first idea was carried out; the treaty was ratified. But no change was made in the language of the constitution, and by the irony of fate, the course of the exemplar of strict construction has ever since been cited to prove that annexation is within the scope of the constitution as it stands.

Jackson, like Jefferson, was committed to the doctrine of strict construction, and Jackson never ceased to pay it intellectual homage. Thus in his annual message to Congress in 1835, Jackson said: "In the regulations which Congress may prescribe respecting the custody of the public moneys it is desirable that as little discretion as may be deemed consistent with their safe-keeping should be given to the executive agents." But in practice Jackson's interpretation of the executive prerogative was quite different.

One of the conspicuous instances was of course the removal of the Government deposits from the Bank of the United States. The law provided that the public funds should be deposited in the Bank or its branches unless the Secretary of the Treasury should otherwise direct and in that case he should report his reasons to Congress. Jackson knew the attitude of Congress. In March of 1833, in response to a recommendation from the President that the safety of the Government deposits in the Bank should be investigated, the House resolved by a vote of 109 to 46 that the deposits were safe. Nevertheless in May the President set out to accomplish his purpose. Successively he changed two Secretaries of the Treasury who disapproved his plan, and with Roger Taney as Secretary the removal was ordered.

At the next session of Congress the Senate resolved "that the President in the late executive proceeding in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws but in derogation of both." Indignantly retorting in a protest which the Senate refused to put in its journal but which has become historic, Jackson the arch Democrat, made claims for the office of President as broad as any ever asserted by the Federalist Hamilton or the liberal constructionist Roosevelt. He said that the President was the direct representative of the American people and possessed of original executive powers absorbing in himself all executive functions and responsibilities.

So imperious was his attitude that von Holst refers to his administration as "The Reign of Andrew Jackson." Clay in opening the debate in the Senate on the removal of the deposits, began: "We are in the midst of a revolution, hitherto bloodless, but rapidly tending toward a total change of the pure republican character of the government, and the concentration of all power in the hands of one man."

No one could be farther removed from the temper of the autocrat than tolerant, kindly Abraham Lincoln. Nor could anyone yield greater respect to the law. Drinkwater in his play truly makes Lincoln's Springfield neighbor, Mr. Stone, say of him "Abraham's all for the Constitution." Yet as President in this free country under the constitution, James Bryce says that "Abraham Lincoln wielded more authority than any single Englishman has done since Oliver Cromwell." and Rhodes quoting this statement says that "My reading of English history and comparative study of our own have led me to the same conclusion."

Exclusive direction by the executive is almost inevitable in war. The situation demands promptitude. There are conditions known to the government in the light of which decisions must be made, which could not safely be revealed to the numerous membership

of Congress. Only the President can act with the knowledge and the speed which are indispensable. The impotence of Congress in such an emergency was brought home in a bit of sarcasm in a debate in the House during the Civil War, on a resolution for an inquiry by a committee into the disasters at Bull Run and Ball's Bluff. Opposing the resolution Crittenden of Kentucky said: "If we are to find fault with every movement, why not appoint a committee of the House to attend the Commander-in-Chief? Why not send them with your army so that the power of Congress may be felt in battle as well as in the halls of legislation?"

Certainly Lincoln exercised the powers of a war President to the full. Rhodes who is a friendly critic, says that many persons in widely scattered localities, even in the stable portions of the north, were arrested without warrant by executive orders on suspicion of disloyalty, were held indefinitely without any charges being preferred and were denied the writ of habeas corpus. In practice the writ was suspended by the administration at discretion many months before Congress authorized that course and undertook to validate the previous acts of the President, by a law passed in the winter of 1863. Professor Dodd, after recounting measures taken by President Wilson to repress opposition to the United States in the recent war, fairly points out that Wilson first secured Congressional sanction, whereas Lincoln acted on his own authority and sought warrant of law afterward. The cases are not entirely parallel. The danger to the Union in the Civil War was serious in the extreme and possibly the occasion for rigid repression was greater. Still when complaint is made of interference with personal freedom by the recent executive, it is pertinent to recall the summary course of Lincoln's department heads. Rhodes, who measures his words, says of this aspect of Lincoln's administration:

> The pervasion of his individual influence, his respect for the Constitution and the law which history and tradition ascribe to him, the greatness of his character and work have prevented the generation that has grown up since the civil conflict from appreciating the enormity of the acts done under his authority by the direction of the Secretaries of State and War.

The most far-reaching exercise of executive prerogative by Lincoln was the emancipation proclamation. Benjamin R. Curtis, whose dissenting opinion as Justice of the Supreme Court in the Dred Scott case had earned him the high regard of the opponents of slavery, nevertheless denounced the proclamation as "military despotism." But the instinct of the President was sounder. The technical argument was that the constitution made the President commander-in-chief of the army, and that he had a right to free the slaves as a means to the winning of the war. The deeper philosophy of the step can best be stated in Lincoln's own words written in 1864:

> By general law, life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the constitution through the preservation of the nation. Right or wrong, I assumed this ground. * * * I could not feel that to the best of my ability I had even tried to preserve the constitution, if to save slavery or any minor matter, I should permit the wreck of government, country, and constitution all together.

The logic of events ratified the decision so made in the travail of Lincoln's soul.

Thus the history of the United States shows that presidential influence is not a matter of recent growth but that the presidency has always been a great office when a great man or a great occasion made it such. When the two combined as in the administration of Abraham Lincoln it became an opportunity for the highest service given to mortal man to perform. We cannot always walk upon the mountain tops of achievement. Lincoln was followed by a line of inconspicuous Presidents. It may be that the large conception of the presidency exemplified in very different ways by Roosevelt and Wilson will give place to more restricted views of the office. But I make bold to say that if there is to be effective leadership in the political life of the nation, it must come from the President, and that presidential leadership is to be welcomed and encouraged as the best hope of progress.

I say leadership must come from the President because it cannot come from anywhere else. No member or group of members in Congress is qualified to exercise it to anything like the same degree, first because they have not the same opportunity for information, second they do not stand before the people as does the President, for the nation as a whole. They do not have the popular mandate. The first point is important. A Congressman, broadly speaking, has the same means of knowledge in regard to governmental problems as any well-informed citizen. He can secure data from the departments by going after it. But the entire administrative organization is an intelligence system for the President. Through the various departments directed by the members of the Cabinet lines of communication concerning every important development in business and society converge upon him.

The second point is even more important. Congress is dominated by the geographical conception. A member of the House or Senate, no matter how broad he would be in sympathy, is regarded primarily as the representative of his state or section. One can claim no more authority to speak for the nation as a whole than another and jealousy would pull him down if he attempted to do so. But the President is elected to represent the nation. He is chosen on the basis of a more or less definite policy or point of view which he has announced. The people expect leadership from him and if he but bring to bear the weight of public approval behind him, Congress dare not reject his leadership. The difference in influence between Harding, Senator, and Harding, President, may not unfairly be regarded as the difference in opportunity for leadership between the office of Senator and the office of President. After all Harding is the same man; it is his position which is different.

If this is true, does it not follow that the effective method of presidential leadership lies in utilizing the assets of the office; the selection of advisers in the Cabinet, clear-minded, broad-visioned, capable of analyzing the immense mass of data turned up for their inspection, and drawing sound conclusions; the formulation of policies based on this competent and well-informed advice, and deliberation around the council table; and finally the statement of such policies to the country and to Congress with a directness and a cogency that will focus upon the Capitol the force of public opinion? For after all that is the strength of the President. If he will be faithful to it and keep it in mind consistently he will go far. If, however, through fear of offending Congress he stands passive and permits the initiative to slip from his hands, waits for Congress to act, then he becomes subject to the

cross-currents of sectional and private interests that whirl and eddy in the semi-concealment of the Capitol. He has sacrificed the power that comes from public opinion, and achievement is not for him.

Presidential leadership does not imply that the President is to hold himself aloof from advice. No policy can succeed which is unrelated to the facts, and if a President closes the doors on the information and just sense of the human factors involved, which otherwise would come through friendly contact with his fellow citizens, he runs the risk of his policies becoming unreal. On the other hand a multitude of counsellors never insured wisdom. When all is said and done, somewhere, somehow a decision must be made, and the President is by far in the best position to lead the way toward a decision.

Neither does presidential leadership imply that Congress is to be disregarded. Far from it. Congress is to be given every opportunity to become a participant in the program. Roosevelt realized the necessity of this. In a letter in 1902 to a friend who criticized the part of his annual message in regard to trusts, he wrote:

> Are you aware that to make publicity an issue is mere nonsense unless I frame legislation which will give us a chance to get it? Are you aware also of the extreme unwisdom of my irritating Congress by fixing the details of a bill, concerning which they are very sensitive, instead of laying down a general policy? * * * Don't you think that you will get a better idea of what I am after, if you remember that I am seeking to secure action by Congress rather than to establish a reputation as a stump exhorter?

Comparison is frequently made, especially by political scientists, between the presidential system of the United States and the parliamentary form of government of Great Britain, to the disparagement of the former. There can be no question that the coordination of the executive with the legislature and the opportunity on any great issue to ascertain the sentiment of the nation and obtain a government in accordance with it has advantages. It insures a government which at all times can function. Not only, however, does parliamentary government seem of only academic interest in the United States, but there is something to be said for the presidential system, at least in the United States where it has developed.

The chief objection to it is the deadlocks which occur under our system, like the one for the last two years where Congress was of one opinion and the President of another, and nothing could be done. The frequency of this situation is however exaggerated. Nearly always in the first half of his term the President has a Congress of the same party, because one third of the Senators and all of the Representatives are selected at the same time upon the same issues, and normally the same result follows. In the generation since the first administration of Grover Cleveland, there has not been a single exception to this rule. Now one Congress is usually enough for a President to carry out the important heads of a legislative program, and even if the next Congress is hostile he has had an opportunity to demonstrate his leadership. If under our system he is debarred from further legislative progress, he is at least assured (except in the unprecedented case of a two-thirds majority able to repeal his fundamental measures over his veto) of a substantial period during which the laws can be tested.

The American system then has a tendency toward stability in governmental policies; toward a fair trial for plans adopted. Citizens can know with reasonable certainty on what to count in the way of government at least for four years, the life of an administration, and regulate their business and conduct accordingly. Consistency of policy over a longer period is desirable, it is true, but this is something. May it not be better for the United States than a system under which a fiscal or regulatory policy for instance would always be subject to change upon the uncertain contingency of the administration's losing the confidence of the people, and business men would be obliged to speculate on the course of public opinion?

Certainly the definite term for the President on occasion has stood the United States in good stead. After the defeat of the Union army in the battle of Fredericksburg late in 1862, a caucus of Republican senators called upon President Lincoln and advised him that the Cabinet, particularly Secretary Seward, was inadequate to the task. Rhodes says that if Lincoln had been an officer of the type of an English prime minister, "Congress would probably have voted a want of confidence in him and his ministry; his resignation or an appeal to the country would have followed." As it was, what Lincoln had said shortly before was true: "There is no way in which I can have any other man put where I am. I am here. I must do the best I can, and bear the responsibility of taking the course which I feel I ought to take." Held at his post by the constitution, Lincoln was given the requisite time to accomplish his work.

Is it not well also that the administration of President Harding can count upon four years of power? The times are unsettled. If the President were obliged to stake the continuance of the important policies which he may adopt upon popular approval whenever circumstances might precipitate an election, he might well be apprehensive. The time might be too short for a fair test. His leadership will be strengthened by the knowledge that if he can procure the legislation which he deems requisite from the incoming Congress, it is virtually certain to stay on the books during his term, and even if there should be a hostile majority in Congress two years hence, the laws enacted at the outset of his term will have a chance to prove their worth in operation until the end.

If this paper has suggested that the great power exercised by the retired chief magistrate is not an isolated instance, not a violation of precedent, but rather that from the beginning the presidency has been a great office, in which strong men have always been enabled to do mightily, it will have served its purpose. Suggestions to the new President will doubtless not be lacking, especially from among his former associates in the Senate, that the executive power has been unduly magnified and that the initiative in legislation should be left to Congress. But if he will learn from history he will realize that the men who have left their impress in the presidential office, are those who have dared to lead. Timidity, indecision, passive waiting upon Congress,—those are qualities which heretofore have spelled the negation of the presidential influence and will inevitably mean failure hereafter. Informed, far-sighted leadership, respectful of Congress but none the less self-reliant, courageous, resting its cause with the people,—that is the way to honorable achievement for the individual and advancement for the nation.

# RECALL OF DECISIONS HELD INVALID

## Colorado Supreme Court Wipes Out Greater Part of Constitutional Amendment Providing for Popular Vote on Supreme Court Decrees

TWO important decisions handed down very recently by the Colorado Supreme Court wiped out the greater part of the "Recall of Decisions" amendment to the State Constitution passed in the fall of 1912. That amendment forbade any trial court to declare or adjudicate any law of the state or any city charter or amendment thereto adopted by the people in pursuance of a certain other article of the Constitution as in violation of either the State or Federal Constitution. It further provided that, should the Supreme Court hold it to be unconstitutional, it should be subject to approval or disapproval by the people, and, when approved by a majority of the votes cast at a recall election, that it should become the law of the state, notwithstanding the decision of the Supreme Court.

In the two cases in question the Colorado Supreme Court held that the attempted denial of power to declare a law in violation of the State or Federal Constitution was null and void, as being in violation of the "supreme law of the land." After citing that section of the Federal Constitution which provides that that instrument shall be the supreme law and that judges in every state must be bound by it, anything in the Constitution or laws of any state to the contrary notwithstanding, and likewise the oath to support the Constitution of the United States and that of the State of Colorado which the Constitution of the state specifically requires of its judges, the court declared that the trial judge was bound to apply the Federal Constitution on all proper occasions, and that any prohibition in the State Constitution was to be disregarded.

Passing to a consideration of the "recall" machinery provided in the amendment, it declared that "what the whole people of a state are powerless to do directly, either by statute or Constitution, i. e., set aside the Constitution of the United States, they are equally powerless to do indirectly . . . by a popular election under the guise of a recall." If the people of a state are empowered, it said, "by the mere reenactment of a statute which violates the Federal Constitution to give full force and effect to such unconstitutional legislation, then that portion of the State Constitution which vests in them such power is itself prohibited by the terms of the federal compact, and is null and void and of no force or effect whatever."

The first case decided, People vs. Western Union Telegraph Company, primarily involved the right of the lower court to declare a statute void as in violation of the Federal Constitution. The defendants were charged with violating the state "Anti-Coercion Act" by discharging one Holson because he refused to withdraw from the Commercial Telegraphers' Union. They demurred on the ground that the "Anti-Coercion Act" was unconstitutional under the Bill of Rights of the State of Colorado and the Fourteenth Amendment to the Federal Constitution. The State's representative objected to the consideration of this issue on the ground that it was prohibited by the State Constitution. Judge Denison of the District Court overruled the objection, held the statute in conflict with the Federal Constitution, and discharged the defendants. The District Attorney took the cause to the Supreme Court by a writ of error, under the mandate of a certain statute.

The opinion was delivered by Justice Burke, who in the beginning expressed the Court's appreciation of the briefs filed by various *amici curiae*. He stated that three questions were presented: the right of the trial court to hear and determine the Federal question, the correctness of the judgment, and the date when the Supreme Court's decision should become effective.

As to the first, the Court held that the trial court was correct in passing on the constitutional question. As to the second, it ruled that his decision was correct, since the decision of the U. S. Supreme Court in Coppage vs. Kansas (236 U. S. 1), a case involving a substantially similar statute, had settled that the act was unconstitutional. On the third point it held that the decision could not be reviewed, suspended or reversed by the method attempted to be provided by the "Recall of Decisions" amendment, but stood on the same footing as any other decision of the Court, and became effective at once, subject only to review in the U. S. Supreme Court.

In People vs. Max, the second case decided, the Court passed on the right of a trial judge to consider a plea that a statute violated the State Constitution. The defendant was there charged with violating the state statute relating to the practice of medicine. He filed a motion to quash and demurrer on the ground that the statute was in violation of certain sections of the State and Federal Constitutions and questioned the jurisdiction of the Court to consider the same. On hearing the Court sustained the motion and demurrer and entered final judgment discharging the defendant.

The Supreme Court, reversing the judgment, held that that part of the section forbidding consideration of State Constitutional questions was not divisible from the part relating to Federal Constitutional questions, and since it had held the latter void in the Western Union Telegraph case, the former must fall with it. It further held the section invalid on the ground that it deprived the defendant of "due process of law": (1) When one is prosecuted under an unconstitutional statute, all the courts are deprived of authority to entertain his defense, inasmuch as the lower court is prohibited from considering it and the Supreme Court has no original jurisdiction; (2) if denial of power in the trial court to hold a law unconstitutional be interpreted as a denial of its power to hold it constitutional, then one who raises a constitutional question thereby ousts the court of jurisdiction and his cause can never be heard; (3) if denial of power in a trial court to hold a law unconstitutional is a command to hold it constitutional, then the court cannot entertain a man's defense, however valid it might otherwise be; (4) a man would be compelled to try a portion of his case in a District Court and a portion in the Supreme Court, even if a way were provided to bring the constitutional question before the Supreme Court.

The court held the recall provisions invalid for the same reason they were so declared in the Western Union Telegraph Company case.

The decisions were unanimous, save for Chief Justice Scott, who was ill and did not sit.

# REVIEW OF RECENT SUPREME COURT DECISIONS

Unreconciled Opposing Views—New Rules in Admiralty—Clayton Act and Secondary Boycott —Freedom of Speech—Relation of States to the United States—Local Law—Following State Decisions—Disqualification of Judges—Jurisdiction —Practice—Right of Residence

By Edgar Bronson Tolman

OF the 347 cases of the October 1920 term, shown in the index of No. 9 Adv. Ops., 248 were disposed of on memoranda opinions, and in 99 cases full opinions were filed. Dissent was recorded in 17 cases.

Nothing is more instructive or interesting than a study of those cases in which dissenting opinions disclose the earnestness with which opposing views have been presented and have failed to be completely harmonized in the consultation room. Three of such cases are included in those reviewed in this column.

The increasing usefulness of the current literature of the law, as embodied in the various law journals, is evidenced by the references to such sources in the marginal notes of Mr. Justice Brandeis' dissenting opinion in the Duplex Printing Press Co. case.

There is presented in Advance Opinions No. 7 the new rules in Admiralty. This exercise by the court of its rule-making power is a striking illustration of the superiority of this method over the system which permits legislative bodies to prescribe the methods of disposition of the business of the judicial department.

**Combinations in Restraint of Trade.— Clayton Act, Secondary Boycott.**

*Duplex Printing Press Co.* v. *Deering et al.*, Adv. Ops., p. 176.

The facts of this case are not complex nor disputed. Complainant manufactured printing presses at its factory in Michigan where it maintained an "open shop." The International Associaton of Machinists, in an effort to compel the "unionizing" of that shop, called a strike which completely failed to accomplish that purpose, and resorted also to a secondary boycott, the form of which was to call upon labor organizations everywhere not to aid in the transportation nor the installation of Duplex presses. Owing to the character of complainant's product and the method of its distribution and installation, this boycott threatened to be so effective that complainant was compelled to file its bill to restrain the destruction of its interstate trade. The defendants were representatives of the International Association, Federal jurisdiction was invoked by reason of diverse citizenship and because defendants were alleged to be engaged in a conspiracy to restrain complainant's interstate trade and commerce, contrary to the Sherman Act. The suit was begun before, but brought to hearing after the passage of, the Clayton Act. On the hearing the District Court dismissed the bill, the Circuit Court of Appeals affirmed the decree by a divided court and the record was brought to the Supreme Court by appeal, and it was a turning point in the case that *none of the defendants was or ever had been an employe of complainant,* nor had complainant at any time *had relations with either of the organizations that defendants represented.*

This is the latest (but not the last) of that series of great cases which mark the evolution of law in regard to labor disputes, and every word of the prevailing and dissenting opinions merits careful and intent reading. We are compelled to omit reference to everything except the effect of the Clayton Act on the secondary boycott.

Mr. Justice Pitney delivered the opinion of the court and on this point said:

> The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a "secondary boycott"; that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ("primary boycott"), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves, should they deal with it.

He then cites and quotes from the two Loewe v. Lawlor cases and the Eastern States Retail Lumber Dealers' Association case (Sherman law cases) and summarizes them as follows:

> It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statutes.

He then approaches the question of how far the Sherman Act has been modified by the Clayton Act and whether the latter act forbade the issuance of an injunction in the case, that being the one point on which the judges of the Circuit Court of Appeals were not in accord. He sets out in the margin sections 6 and 20 of the Clayton Act. Of section 6 he says:

> The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the Anti-trust Laws shall be construed to forbid the existence and operation of such organizations, or to forbid their members from *lawfully carrying* out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operations—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects, and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the Anti-trust Laws.

In regard to Section 20 which was principally relied upon as prohibiting the issuance of an injunction, he said:

> All its provisions are subject to a general qualification respecting the nature of the controversy and the parties

affected. It is to be a "case between an employer and employees, * * * or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment."

The first paragraph * * * is but declaratory of the law as it stood before. The second paragraph declares that "no *such* * * * injunction" shall prohibit certain conduct specified,—manifestly still referring to a "case between an employer and employees, * * * involving, or growing out of, a dispute concerning terms or conditions of employment," as designated in the first paragraph. It is very clear that the restrictions upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. * * * And the concluding words, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," are to be read in the light of the context, and mean only that those acts are not to be so held, when committed by parties concerned in "a dispute concerning terms or conditions of employment." If the qualifying words are to have any effect, they must operate to confine the restriction upon the granting of injunctions, and also the relaxation of the provisions of the Anti-trust and other laws of the United States, to parties standing in proximate relation to a controversy such as is particularly described.

He next considered the position taken by the majority of the Circuit Court of Appeals, that the words "employers and employees," as used in Section 20, should be treated as referring to "the business class or clan to which the parties litigant respectively belong" and that since there had been a dispute concerning labor conditions at complainant's factory in Michigan, Section 20 operated to permit members of the Machinists' Union elsewhere—some 60,000 in number—although standing in no relation of employment under complainant, to make that dispute their own and instigate sympathetic strikes and boycotts against employers wholly unconnected with complainant's factory, having relations with complainant only as purchasers of its presses in the ordinary course of interstate commerce, where there was no dispute between such employers and their employes respecting terms or conditions of their employment. Having already forestalled this argument by the application of the doctrine of *noscitur sociis* to his own interpretative processes, he now counters effectively:

We deem this construction altogether inadmissible. Section 20 must be given full effect according to its terms * * * but it must be borne in mind that the section imposes an exceptional and extraordinary restrictions upon the equity powers of the courts of the United States, and upon the general operation of the Anti-trust Laws,—a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section * * *. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment. * * * Congress had in mind particular industrial controversies, not a general class war. * * * and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic sense, by the cause of dispute.

In answer to the statement of the majority opinion of the Circuit Court of Appeals that the legislative history of the Clayton Act warrants the broad interpretation of the Act adopted by that Court, the learned Justice proceeds to the consideration of that aspect of the case. He first calls attention to the decisions that debates in Congress expressive of the views and motives of individual members are not a safe guide and hence may not be resorted to in ascertaining the meaning and purpose of the lawmaking body, but that reports of committees of House and Senate stand upon a more solid footing and may be regarded as an exposition of the legislative intent where the meaning of a statute is obscure, and that like effect has been accorded to explanatory statements in the nature of a supplemental report made by the committee members in charge of a bill in course of passage. He inserts in the margin quotations from such explanatory statements so made by the committee member in charge of the Clayton Bill and summarizes his statements as declaring that the bill was carefully framed with the settled purpose of excluding the secondary boycott from the acts authorized, that not a member of the committee would have voted to authorize such boycott. This, says the learned Justice, was

the final word of the House committee on the subject, and was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that, except for this exposition of the meaning of the section, it would not have been enacted in the form in which it was reported.

He summarizes the "harmful consequences of the construction adopted in the court below" as follows:

An ordinary controversy in a manufacturing establishment, said to concern the terms or conditions of employment there, has been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them, carried out by inciting sympathetic strikes and a secondary boycott against complainant's customers, to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and actual dispute,—people constituting, indeed, the general public upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the Anti-trust Laws, of which the section under consideration forms, after all, a part.

An injunction was accordingly ordered against the defendants, the organizations represented by them, and all members of such organizations, restraining any interference with the sale, transportation or installation of complainant's presses and any sympathetic strike or boycott against those who might purchase, transport or install the same.

Mr. Justice Brandeis wrote the dissenting opinion, in which Mr. Justice Holmes and Mr. Justice Clarke concurred.

The dissenting opinion is of great interest to the student of the evolution of law. It presents the defendants' justification for interference with the complainant's business by the common law of New York where the suit was brought and by Section 20 of the Clayton Act:

First. As to the rights at common law: Defendants' justification is that of self-interest. They have supported the strike at the employer's factory by a strike elsewhere against its product. They have injured the plaintiff, not maliciously, but in self-defense. * * * that the contest between the company and the machinists' union involves vitally the interest of every person whose co-operation is sought. May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? Applying common law principles the answer

should in my opinion, be: Yes, if, as a matter of fact, those who so co-operate have a common interest.

Space is not here available to review the historical review of the changes in the interpretation of the common law by the courts, "by which strikes once illegal and even criminal are now recognized as lawful," a change due, says Mr. Justice Brandeis, "to a better realization of the facts of industrial life."

> Second. As to the Anti-trust Laws of the United States (quoting at length from Section 20 of the Clayton Act) * * * This statute was the fruit of unceasing agitation, which extended over more than twenty years, and was designed to equalize before the law the position of workingmen and employer as industrial combatants. * * * It was objected that, due largely to environment, the social and economic ideas of judges * * * were prejudicial to a position of equality between workingman and employer; * * *
>
> By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to be done by expressly legalizing certain acts, regardless of the effects produced by them upon other persons. * * * The resulting law set out certain acts which had previously been held unlawful, whenever the courts had disapproved of the ends for which they were performed; it then declared that, when these acts were committed in the course of an industrial dispute, they should not be held to violate any law of the United States.

Thus far it will be seen that there is no real conflict exposed between the majority and minority members of the court. The point of departure is to be found in the following quotation:

> The Duplex Company contends that Section 20 * * * does not apply to the case at bar because it is restricted to cases "between an employer and employees * * * involving or growing out of a dispute concerning terms or conditions of employment," whereas the case at bar arises between an employer in Michigan and workingmen in New York, not in its employ, and does not involve their conditions of employment.

His answer to this contention, and therefore to the prevailing opinion, which sustained it, is as follows:

> But Congress did not restrict the provision to employers and workingmen *in their employ*. By including "employers and employees" and "persons employed and persons seeking employment" it showed that it was not aiming merely at a legal relationship between a specific employer and his employees. Furthermore, the plaintiff's contention proves too much. If the words are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workingmen, since the very acts to which it applies sever the continuity of the legal relationship.

Whatever may be thought as to the sufficiency of this reply, there should be no difference of opinion as to the importance and solemnity of the warning with which the dissenting opinion concludes:

> Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of justification of self interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contests, and to declare the duties which the new situation demands. This is the function of the legislature, which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.

Messrs. Daniel Davenport and Walter Gordon Merrett argued the case for the Printing Press Co. and Mr. Frank X. Sullivan for the representatives of the Unions.

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**Constitutional Law.—(a) Freedom of Speech, Relation of States to United States.**

*Gilbert* v. *Minnesota*, Adv. Ops. 146.

A statute of Minnesota declares it unlawful "to interfere with or discourage the enlistment of men in the military or naval service of the United States or of the State of Minnesota."

James Gilbert, manager of the organization department of the Non-Partisan League, publicly flouted the genuineness of our democracy, denounced the war, impugned the motives of our participation in it, declared that "We were stampeded into it by newspaper rot to pull England's chestnuts out of the fire for her," protested against the conscription of men and declared that "if they conscripted wealth, like they have conscripted men, this war would not last over forty-eight hours." He was convicted, sentenced to pay a fine of $500 and to be imprisoned one year. The judgment of the trial court was affirmed by the Supreme Court of the State and Gilbert sued out a writ of error to the Supreme Court of the United States, contending there that the statute was repugnant to the Constitution of the United States in that (1) all the power of legislation regarding the subject matter of the statute was conferred upon Congress and withheld from the states; (2) that it was obnoxious to the "inherent right of free speech."

Mr. Justice McKenna delivered the opinion of the court. He declared that the basis of the first objection seemed to be

> that plaintiff in error had an accountability as a citizen of the United States different from that which he had as a citizen of the State, and that therefore he was not subject to the power or jurisdiction of the State, exercised in the act under review,

and that to support the contention

> the broader proposition must be established that a State has no interest or concern in the United States or its armies, or power of protecting them from public enemies.

After having thus exposed by analysis the assumptions on which the first objection rested, he disposed of it as follows:

> Undoubtedly, the United States can declare war, and it, not the States, has the power to raise and maintain armies. But there are other considerations. The United States is composed of the States, the States are constituted of the citizens of the United States, who also are citizens of the States, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the States as well as the United States are intimately concerned.

We break the quotation here to emphasize what the learned Justice says in his next sentence, because it should be set off by itself for the instruction of a people who for the most part faced the war with no conception of the fundamental proposition that war under modern conditions demands not only all the man power, and all the material, but also all the spiritual resources of a nation:

> And whether to victory or defeat depends upon their morale, the spirit and determination that animates them,—whether it is repellant and adverse or eager and militant,—and to maintain it eager and militant against attempts at its debasement in aid of the enemies of the United States is a service of patriotism. * * * This country is one composed of many, and must on occasions be animated as one, and * * * the con-

stituted and constituting sovereignties must have power of co-operation against the enemies of all.

The second objection is dealt with in an equally impressive way:

> The next contention is that the statute is violative of the right of free speech, and therefore void. * * * We pass immediately to the contention, and for the purposes of this case may * * * concede that the asserted freedom is natural and inherent, but it is not absolute,—it is subject to restriction and limitation. And this we have decided. * * * (citing Schenck v. U. S., 249 U. S. 47, 52; Frohwerk v. U. S., id. 204, 206; Debs v. U. S. id. 211, and Abrams v. U. S. 250 U. S. 616).
>
> Gilbert's speech had the purpose they (the cases cited) denounce. The nation was at war with Germany, armies were recruiting, and the speech was the discouragement of that,—its purpose was necessarily the discouragement of that. It was not an advocacy of policies or a censure of actions that a citizen had the right to make. The war was flagrant; it had been declared by the power constituted by the Constitution to declare it * * *. It was not declared in aggression, but in defense,—in defense of our national honor,—in vindication of the "most sacred rights of our nation and our people."
>
> This was known to Gilbert, for he was informed in affairs and the operations of the Government, and every word that he uttered in denunciation of the war was false,—was deliberate misrepresentation of the motives which impelled it, and the objects for which it was prosecuted. He could have had no purpose other than that of which he was charged. It would be a travesty on the constitutional privilege he invokes to assign him its protection.

Mr. Justice Holmes concurred in the result.

The Chief Justice, being of the opinion that the subject matter was within the exclusive legislative power of Congress, when exerted, and that the action of Congress had occupied the whole field, therefore dissented.

Mr. Justice Brandeis presented fully the reasons upon which he founded his dissent. It is not easy to review this dissenting opinion with brief comment. Perhaps the shortest path to the real significance of the opinion leads first through the field of what the learned justice did not say. He did not even by inference record his dissent from the statement of Mr. Justice McKenna in the prevailing opinion, that every word which Gilbert uttered in denunciation of the war was deliberately false and made for no other purpose than to interfere with or discourage the enlistment of men in the military or naval service of the United States, then engaged in war against Germany, nor did he justify or extenuate the words or conduct of the plaintiff in error. Indeed his criticism of the Minnesota statute under review was not that the plaintiff in error had been dealt with unjustly or with undue severity, but that the law was susceptible of an interpretation which at other times and in other circumstances might be used as a warrant for the prosecution of those who, in good faith and in the discharge of duty, were expressing honest belief and the reasons on which such beliefs were founded.

Nor did the dissenting opinion challenge the right of the Congress to pass similar laws in time of war. On the contrary, the dissenting Justice said:

> Congress, which has power to raise an army and naval forces by conscription when public safety demands, may, to avert a clear and present danger, prohibit interference by persuasion with the process of either compulsory or voluntary enlistment. As an incident of its power to declare war, it may, when the public safety demands, require from every citizen full support, and may, to avert a clear and present danger, prohibit interference by persuasion with the giving of such support.

But Mr. Justice Brandeis couples these admissions of power in time of necessity, with emphatic protest in favor of the ancient right of free speech. From many earnest sentences the following are typical selections:

> In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril. There are times when those charged with the responsibility of government, faced with clear and present danger, may conclude that suppression of divergent opinion is imperative, because the emergency does not permit reliance upon the slower conquest of error by truth and in such emergencies the power to suppress exists. But the responsibility for the maintenance of the army and navy, for the conduct of war and for the preservation of government, both state and federal * * * rests upon Congress.

And here the learned Justice hangs the whole case of his dissent, which, after the citation of prior decisions, he summarizes as follows:

> Congress, being charged with responsibility for these functions of government, must determine whether a paramount interest of the nation demands that free discussion in relation to them should be curtailed. No state may trench upon its province.

It will undoubtedly be considered permissible to regret, with deference, expressions which seem to regard with solicitude an undefined "doctrine of pacifism." So many innocently foolish ideas and so many more astutely wicked ideas have claimed the right to parade under the banner of pacifism, that the very word has an acquired secondary meaning, which gives it an offensive odor in the nostrils of those who have observed its use as a cloak for hypocrisy, cowardice and selfishness. Would it not have been helpful to have defined the term or to have so used it as to show that what the learned Justice had in mind was not the kind of "pacifism" with which we have become acquainted during the war?

The case was argued by George Nordlin and Frederick A. Pike for plaintiff in error and by James E. Markham for the State of Minnesota.

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(b) **Right of Residence, Ingress, Egress.**

*U. S.* v. *Wheeler*, Adv. Ops. 153.

Citizens and residents of Arizona, deeming the presence of others (citizens and non-citizens of that state) to be undesirable, armed themselves, procured a railroad train, shepherded 221 of the so-called "undesirables" on board the train, forcibly transported them to the State of New Mexico and there released them under threat of death or great bodily harm, should they return to Arizona.

Twenty-five persons were indicted in the Federal District Court of Arizona for conspiring in violation of Sec. 19 of the Criminal Code to "injure, oppress, threaten and intimidate" the 221 persons above referred to, alleged to be citizens of the United States, some citizens of Arizona, and some citizens of other States, and thus to deprive them of rights and privileges secured to them by the Constitution or laws of the United States; that is to say, the right and privilege pertaining to citizens of said State peacefully to reside and remain therein and to be immune from unlawful deportation from that State.

The District Court quashed the indictment on the ground that no power had been delegated by

the Constitution to the United States to forbid and punish the wrongful acts complained of, and that the right to do so was exclusively within the authority reserved by that instrument to the several States. The government brought the case directly to the Supreme Court, under the Criminal Appeals Act.

The opinion was delivered by the Chief Justice, and he sustains the rights and privileges claimed and condemns the wrongs committed, but holds that the exclusive power to declare and punish such offenses was reserved by the several States and was never delegated to the United States. He lays down three propositions which he says "are in reason so well founded and so conclusively sustained by authority as to be indisputable."

> (a) In all the States, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the States to forbid and punish violations of this fundamental right.
>
> (b) * * * By that provision (Article 4 of the Confederation) uniformity was secured, not by lodging power in Congress to deal with the subject, but while reserving in the several States the authority which they had theretofore enjoyed, yet subjecting such authority to a limitation inhibiting the power being used to discriminate. * * * (Citing the Article.) Thus while power remained in the several States * * * the frontiers of the Confederation became the measure of the equal right secured to the inhabitants of each and all the States.
>
> (c) That the Constitution plainly intended to preserve and enforce the limitations as to discrimination imposed upon the States by Article 4 of the Confederation, and thus necessarily assumed the continued possession by the States of the reserved power to deal with free residence, ingress and egress * * * (Citing and quoting from Paul v. Virginia, 8 Wall. 168, 180; Ward v. Maryland, 12 Wall. 418, 430; Slaughter-House Cases, 16 Wall. 36, 75; and Corfield v. Coryell, 4 Wash. C. C. 371, 380.)

Applying these doctrines the conclusion is reached that there is no right in the Federal Courts to prevent or punish invasion of these privileges when the invasion is by individuals; that only where the invasion consists in a breach by the State of the inhibition against discrimination is there a case for Federal cognizance; that Section 2, Article 4 of the Constitution, like the 14th Amendment, is directed alone against State action.

Mr. Justice Clarke dissented without opinion.

Mr. W. C. Herron argued the case for the United States, and Mr. Charles E. Hughes for defendants in error.

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**Federal Courts.—Local Law, Following State Decisions.**

*Marshall* v. *New York*, Adv. Ops. 157.

In a Federal receivership the question arose as to whether the State of New York was entitled to priority over general creditors for (a) amounts due for annual franchise taxes, and (b) amounts due for license fees for the privilege of doing business.

The District Court held that priority existed as to (a) but not as to (b). The Circuit Court of Appeals held that priority existed as to both taxes.

Mr. Justice Brandeis, delivering the opinion of the court, said:

> Whether the priority enjoyed by the State of New York is a prerogative right or merely a rule of administration is a matter of local law. Being such, the decisions of the highest court of the State as to the existence of the right and its incidents will be accepted by this court as conclusive.

The judgment of the C. C. A. was affirmed.

Argued by A. S. Gilbert, Francis Gilbert and William J. Hughes for petitioner and by Cortland A. Johnson and Robert P. Beyer for respondent.

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*Thornton* v. *Duffy*, Adv. Ops. 164.

The Constitution of Ohio authorizes Workmen's Compensation Laws and explicitly provides for the passage of laws establishing a State fund to be created by compulsory contributions thereto by employers, the fund to be administered by the State.

The statute under consideration provided that every employer (with certain exceptions) should pay semi-annually into the State insurance fund the amount of premiums fixed by the board of awards for the particular employment or occupation. It was however also provided, as an alternative, that certain employers under certain conditions might pay compensation individually or from a fund, department or association, to employes and their dependents. While the law thus provided, plaintiff in error elected to pay individually, he was given a certificate of sufficient financial ability by the Industrial Commission, and entered into a contract with a duly licensed insurance company to pay his injured employes the compensations required by the Act, for injuries or upon death, and it agreed to indemnify him against the liabilities and requirements of the Act. Subsequently the Ohio Law was amended so as to limit the privilege of electing between dealing with employes and contributing to the State fund, to those employers "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by direct payment thereof." Whereupon the Industrial Commission, solely on the ground of its duty under the laws of the State, revoked its prior certificate. The employer then brought suit to enjoin the promulgation and enforcement of the order of revocation and interference with his right to settle directly with his employes and to maintain and continue indemnity insurance in respect of his liability as an employer. He claimed that his right to elect the alternative method of direct settlement and insurance against its requirements became property and inviolable—became contracts with immunity from impairment. The Supreme Court of Ohio held that the alternative was a right that need not have been given and that therefore to effect the purpose of the Constitution and law it could be withdrawn; that the right to withdraw it was reserved by certain provisions of the original act and that the experience of four years demonstrated the necessity or desirability of a change.

The opinion of the court was delivered by Mr. Justice McKenna. He said, after reviewing the decision of the Supreme Court of Ohio:

> * * * We must accept the decision of the court as the declaration of the legislation and the requirement of the Constitution of the State, as much a part of both as if expressed in them. * * * The law expressed the constitutional and legislative policy of the State that the compensation to workmen for injuries received in their employment was a matter of public concern, and should not be left to the individual employer or employee, or be dependent upon or influenced by the hazards of controversy or litigation, or inequality of conditions.

> * * * We are not called upon to controvert the right to insure against contingent losses or liabilities. * * * We are only called upon to consider its relation to and possible effect upon the policy of a workmen's compensation law, and we can readily see that it may be, as it is said the experience of Ohio demonstrated, inimical to that policy to permit the erection of an interest or a power that may be exerted against it or its subsidiary provisions.

The Chief Justice concurred because in view of the prior decision of the court in Mountain Timber Co. v. Washington, 243 U. S. 219, he thought himself not at liberty to consider the subject as an original question.

Mr. Justice McReynolds dissented without opinion.

Messrs. Judson Harmon and Arthur I. Vorys argued the case for the employer and Messrs. Timothy S. Hogan and B. W. Gearheart for the Industrial Commission of Ohio.

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**Judges—Disqualification.**

*Berger et al.* v. *U. S.* Adv. Ops. p. 277.

Defendants, who had been indicted for violation of the Espionage Act, filed an affidavit under Section 21 of the Judicial Code, charging Judge Landis, who was to preside at the trial, with personal bias and prejudice against them, and moved for the assignment of another judge.

The affidavit averred that Judge Landis had said:

> If anybody has said anything worse about the Germans than I have I would like to know it, so I can use it. * * One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty * * I know a safe-blower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safe-blower.

In order to prevent any false inferences as to the allegations of this affidavit, it should here be stated that the court permitted the District Attorney to file a stenographic report of the proceedings to which the affidavit referred, that this report was "in marked contrast with the affidavit," and that there was nothing in what the court actually said indicating "that the judge directed his observations at the German people in general, but rather that his remarks were aimed at one convicted * * of violation of the law."

The motion was denied, the defendants were convicted and each sentenced to twenty years imprisonment, and they took the case to the Circuit Court of Appeals, Seventh Circuit. That court certified to the Supreme Court questions for advice as to: (1) the sufficiency of the affidavit, (2) the right of the judge to pass upon it, and (3) his right after the filing thereof, to preside at the trial.

The prevailing opinion was delivered by Mr. Justice McKenna. Defining the questions of law involved, this learned Justice said:

> The basis of the question is Sec. 21, and the primary question under it is the duty and power of the judge—whether the filing of an affidavit of personal bias or prejudice compels his retirement from the case, or whether he can exercise a judgment upon the facts affirmed and determine his qualification against them and the belief based upon them. * * The assertion of the defendants is that the mandate of the section is not subject to the discretion or judgment of the judge. The assertion of the United States is that * * the action of the affidavit is not automatic * * but depends upon the substance and merit of its reasons and the truth of its facts, and upon both the judge has jurisdiction to pass.

Declaring the issue thus made to be "precise" and "practically of first impressions," he reviewed all the available citations of Sec. 21 and reached the conclusion:

> * * that an affidavit on information and belief satisfies the section, and that upon its filing, if it show the objectionable inclination or disposition of the judge * * it is his duty to "proceed no further" in the case.

He also expressed the belief that only the sufficiency of the affidavit was to be considered, that it was not proper to consider its truth or falsity and that for this reason he had not referred to the stenographic report of the proceedings to which the affidavit referred.

The learned Justice earnestly supported the conclusions which he had reached by pointing out the necessity not only that every defendant should have a fair trial but that he should believe that he had been fairly tried; that it was of little importance whether one or another judge should try a particular case; that if error were committed in denial of the motion, the remedy by appeal would be inadequate and that the remedy by prosecution for perjury and disbarment of the counsel who certified to the good faith of the application would adequately safeguard the public interests where so little was to be gained by the defense.

Mr. Justice Day wrote a dissenting opinion in which Mr. Justice Pitney concurred and Mr. Justice McReynolds wrote a separate dissent.

Mr. Justice Day said:

> I accept the opinion of the majority that the judge * * may pass upon the sufficiency of the affidavit, subject to a review of his decision by the Appellate Court, and if it be sufficient to show personal bias and prejudice the judge should not try the case. But I am unable to agree that * * the statements of the affidavit, however unfounded, must be accepted by the judge as a sufficient reason for his disqualification, leaving the vindication of the integrity and independence of the judge to the uncertainty and inadequacy of a prosecution for perjury.

The learned justice then takes up the stenographic report of the proceedings in the prior case, compares them with the affidavit and brings out in strong relief the disparity between the allegations and the fact, and says that while the language of the judge in sentencing the defendant in the prior case "might have been more temperate" he was unable to find from the affidavit and the stenographic report read together, evidence of personal bias or prejudice against the defendants, which required the judge, "upon the mere filing of this affidavit to permit its misleading statements to be placed of record and to proceed no further with the case."

Mr. Justice McReynolds' views were expressed in language not susceptible of misinterpretation. He said:

> If an admitted anarchist charged with murder should affirm an existing prejudice against himself, and should specify that the judge had made certain depreciatory remarks concerning all anarchists, what would be the result? Suppose official stenographic notes or other clear evidence should demonstrate the falsity of an affidavit, would it be necessary for the judge to retire? And what should be done if dreams or visions were the basis of an alleged belief? * * Defendant's affidavit discloses no adequate ground for believing that personal feeling existed against any one of them. The indicated prejudice was towards certain malevolents from Germany—a country then engaged in Hunnish warfare, and notoriously encouraged by many of its natives, who unhappily had obtained citizenship here. The words attributed to the judge (I do not credit the affidavit's accuracy) may be

fairly constructed as showing only deep detestation for all persons of German extraction who were at that time wickedly abusing privileges granted by our indulgent laws. * * A public official who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place. And while "an over speaking judge is no well-tuned cymbal" neither is an amorphous dummy, unspotted by human emotions, a becoming receptacle for judicial power.

The case was argued by Messrs. Seymour Stedman and Henry F. Cochems for Berger et. al. and by Solicitor General Frierson for the United States.

### Jurisdiction.—Federal Question.

*Soo Ry. Co.* v. *Washburn Lignite Coal Co.*, Adv. Ops., p. 161.

A suit by a carrier against a shipper for additional compensation to that demanded and paid at the time the service was rendered, resulted in a judgment adverse to the carrier at *nisi prius* and in the Supreme Court of the State.

A writ of error was sued out to the Federal Supreme Court on the ground that the State Supreme Court upheld and gave effect to a local rate statute, which the carrier contended was obnoxious to the due process clause of the 14th Amendment.

Mr. Justice Van Devanter delivered the opinion of the court after a painstaking review of the record and analysis of the opinion of the State Supreme Court. The crux is in the following sentences:

> The opinion rendered by that court shows that it did not uphold or give effect to the statutory rate as such, but rested its decision on other independent grounds which appeared to it to preclude a recovery by the carrier. These grounds are broad enough to sustain the judgment, and, if not well taken, are not without substantial support. * * * Some may possibly involve Federal questions, but, under the jurisdictional statute, as amended in 1916, they are not such as to entitle the carrier to a review of the judgment, on a writ of error.

In a "companion case" (Soo Ry. Co. v. Merrick Co.) the State Supreme Court based its decision on the interpretation of the words "without prejudice" in a prior decree. Mr. Justice Van Devanter shows that the State court interpreted the term on the authority of and in consonance with the repeated decisions of the Federal Supreme Court and said:

> When we have in mind the question which the Supreme Court was called upon to decide, and did decide, and the fact that the question was no longer an open one in this court * * * it is apparent that this writ of error is without any adequate basis.

Mr. John L. Erdall argued the cases for the carrier and Messrs. Andrew Miller and Alfred Zuger for the shippers.

### Practice.—(a) Bill of Review, Certiorari

*Walt Brake & Electric Co.* v. *Christensen*. Adv. Ops. 188.

A patent of the respondent Christensen was sustained by the district court of Wisconsin, the decree was affirmed by the Circuit Court of Appeals, 7th Circuit, an application for a writ of certiorari was denied by the Supreme Court and on remand to the District Court an accounting was begun.

Subsequently in a suit brought by the same complainants in Pennsylvania the same patent was held void by decree of the District Court, affirmed by the Circuit Court of Appeals, Third Circuit, and that suit dismissed.

Thereupon the Brake and Electric Co. after an ineffective motion in the District Court, filed a petition in the Court of Appeals, Seventh Circuit, setting up the entire record in the Pennsylvania case, asked that it be declared to be res judicata, that the pending proceedings for an account be terminated and the case dismissed. This petition was denied by the Court of Appeals and writ of certiorari was sued out and allowed by the Supreme Court.

Mr. Justice Day delivered the opinion of the court and held that the proper remedy in such cases was an application to the Appellate tribunal for leave to file a bill in the nature of a bill for review in the court of original jurisdiction, and that the petition should have been so regarded and acted upon by the Court of Appeals.

It was also held that certiorari and not appeal was the proper method of bringing the record before the Supreme Court because

> the line of division between cases appealable from the Circuit Court of Appeals and those made final in that court was determined by the source of original jurisdiction of the trial court, and not by the nature of the questions of law raised or decided;

And that the petition was ancillary to the original jurisdiction invoked and was

> in its essence and nature a suit involving the validity of a patent, which is expressly made final in the Circuit Court of Appeals, subject to the right of the court to review by writ of certiorari.

The decree of the Court of Appeals was accordingly reversed and the cause remanded to that court for further proceedings upon the petition in conformity with the opinion of the Supreme Court.

Mr. John S. Miller argued the case for petitioner and Mr. Joseph B. Cotton for respondents.

### Treaties

*Sullivan* v. *Kidd*. Adv. Ops. p. 192.

The laws of Kansas do not permit aliens to inherit real estate. The treaty of March 2, 1899, between Great Britain and the United States gave the right of testamentary disposition to the citizens and subjects of each of the contracting parties respecting personal property within the territories of the other, and provided that where by the law of the situs the citizens of either were disqualified from inheriting lands within the territory of the other, such citizens might take and sell the same within a specified term; but the treaty provided that its stipulations should not be applicable to British Colonies or foreign possessions unless, within one year from the treaty date, notice should have been given on behalf of such colony of its adhesion to the treaty.

As to Canada no such notice was ever given.

Mr. Justice Day delivered the opinion of the court, holding that

> * * treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties. * *

After reviewing the provisions of the treaty and contemporaneous official construction thereof, the court reached the conclusion that

> for lack of notice of the adhesion of Canada to the terms of the treaty, the law of Kansas was not superseded in favor of British subjects resident in Canada, and it (the Kansas law) determined the right of aliens to inherit land in that state.

The case was argued by Messrs. George F. Beatty and B. I. Litowich for appellant, by H. M. Langworthy for appellee, and, by special leave, by Solicitor General Frierson for the United States.

# CURRENT LEGAL LITERATURE

WITH January, 1921, the Boston University School of Law begins the publication of a new law journal called the *Boston University Law Review*. It is to be issued quarterly. The January issue contains a foreword and an article on Old Germanic Society by the noted law author and teacher, Melville M. Bigelow. Edward A. Harriman contributes an article on Government Contracts and the Dent Act and Simeon E. Baldwin writes on the Evolution of a World Court. The impression produced by the first issue of this new periodical is a promise of a law journal of first rank.

Sam B. Warner of the University of Oregon has published in the California Law Review (March) the results of his investigation of 2247 *suits for divorce in the Superior Court of San Francisco:*

> It shows among other things that divorces are denied in default cases in but four suits in a thousand, so that the divorce law of California as enforced by the San Francisco Superior Court is that, if both spouses are willing, either can obtain a divorce by asking for it. Now that may not be what the law should be, and is not the law of California as it appears in the statute books or the decisions of the appellate courts, but it is the law the Superior Court of San Francisco is enforcing. Without knowing these facts the legislature can tinker with the grounds of divorce appearing in the statute books and can deceive itself into believing that it is changing the divorce law of California. But before any intelligent alteration, if any be desired, can be made, it is necessary to take into consideration these facts and their cause.

Other equally important results are obtained by this method of legal investigation. The author nowhere indicates that he considers conditions in San Francisco exceptional as compared with those in other cities of the country. Apart from the results produced, this article is of capital importance as an example of what this method of legal research will yield.

The author's introductory note to the article, *The Use of Indefinite Terms in Statutes* by Ernest Freund, Yale Law Journal (March) is as follows:

> This article is an attempt to work out, in a limited field, but in some detail, principles of law applicable to the framing of legislation, i. e., principles that should be observed in order to obtain a legally workable, not merely a constitutional, statute.
>
> The legitimate province of such a legislative jurisprudence remains to be determined. The proper choice of terms is obviously one of its important problems; the choice of forms of legal acts another; the choice of methods of regulation a third. The propriety of using indefinite terms is part of the first problem.

Under what circumstances has a creditor an insurable interest in the life or property of his debtor and in what cases can a debtor insure his life for the benefit of his creditor? In answering these questions in the Columbia Law Review (March) under the title, *Creditor Insurance and Creditors' Rights,* Garrard Glenn has also made a valuable supplement to his most useful book on Creditor's Rights.

In the March issue of the Harvard Law Review Joseph Warren publishes the first part of his review of the progress of the law in the field of *Estates and Future Interests* during 1919-1920.

Where the statutes and contracts providing for preferred stock in a corporation are silent as to the matter, *does the preferred stock share with the common stock in the distribution of earnings in excess of the preferred rate?* George J. Thompson examines this question in the Michigan Law Review for March. He discloses the remarkable fact that this question was not passed upon directly until 1906 and concludes that the present prevailing view is that preferred stock is limited to its percentage of preference. This he considers the mercantile view and true by the law merchant. The problem is not considered functionally, i. e. as a problem in dynamic corporate finance. It needs consideration from this angle.

Problems in the law of bankruptcy arising when a stock broker becomes bankrupt because of his threefold relation of agent, creditor and pledgee are considered by Marshall S. Hagar of the New York Bar in the March number of the Yale Law Journal under the caption, *The Bankruptcy Law as Applied to Stock Brokerage Transactions.*

*The Uniform Stock Transfer Act* prepared by Professor Williston and adopted by fourteen states is the subject of an extended examination by H. B. Seymour of the University of California in the California Law Review for March.

A glimpse of how old and how general are some of the ideas which modern occidental law contains is to be had in the bits of out-of-the-way learning collected by John Wu under the title, *Readings from Ancient Chinese Codes and Other Sources of Chinese Law and Legal Ideas* in Mich. Law Review (March).

In the Dickinson Law Review (March) Robert Worth Lyman publishes an extended comparison of *Roman Responsa Prudentium and English Case Law.*

Two important articles on the law of trusts appear in the Harvard Law Review for March. They are: *Participation in a Breach of Trust,* by Austin W. Scott, and *The Liability of an Inactive Co-Trustee,* by George G. Bogart.

An extended discussion of *Injuries Arising Out of and in the Course of the Employment* within the meaning of workmen's compensation acts now to be found in forty-six states is being printed in the Central Law Journal, beginning with the issue of March 4. The author is C. P. Berry of St. Louis.

Almost all current periodical discussions of the *Kansas Industrial Relations Act* either condemn it unqualifiedly or are pæans of unstinted praise. Of the latter sort is *The Kansas Court of Industrial Relations* by William R. Vance, Yale Law Journal (March). Now the amount of expression of conflicting opinions regarding the Act would seem to indicate that something may fairly be said on both sides of this question. It would, accordingly, be very grateful if more writers would avoid an emotional approach to the subject and attempt rationally to state those things which can be said on each side of this question and which will make an appeal to the good sense of those trying to form a rational, not an emotional, judgment of the Act's probable social utility.

John D. Carroll, formerly Chief Justice of the Court of Appeals of Kentucky, most interestingly traces *the development of the judiciary of Kentucky* in an address reprinted in the Kentucky Law Journal for January.

The March issue of the American Labor Legislation Review is devoted to the subjects of *unemployment and health legislation.*

Problems relating to the return on estates of nonresident decedents under the *Federal Estate Tax Law*

are the subject of an article by Julius Goebel, Jr., in the February number of the Virginia Law Review.

In the same journal is to be found a study of *Rights Incident to Realty* by Henry Upson Sims of Birmingham, Alabama, and an article dealing with *Unfair Competition* written by R. W. Carrington of Richmond, Virginia.

All of the leading articles in the March issue of the Illinois Law Review are devoted to *the Federal Trade Commission*. A general treatment of the jurisdiction and procedure of the Commission appears over the signature of Stanley B. Houck of the Minnesota bar. An article by Henry Veeder, general counsel for Swift and Company, is headed *The Federal Trade Commission and the Packers*. Walter L. Fisher, counsel for the market committee of the National Live Stock Association, replies to Mr. Veeder's article under the caption, *The Packers and the Public*. The unusually close contact which these three men have had with the subjects treated makes what they have to say of much more than average interest. The composite result is an unusually meritorious issue of this journal.

Of current interest is an article by William Whitwell Dewhurst of the Florida Bar which is entitled, *Does the Constitution Make the President the Sole Negotiator of Treaties?* It appears in the March issue of the Yale Law Journal.

# CAMPAIGN FOR MODERNIZING PROCEDURE

## Every Judge and Lawyer Should Participate in Movement to Give U. S. Supreme Court Rule-Making Power in Common Law Cases

By Thomas W. Shelton

*Chairman Committee on Uniform Judicial Procedure*

THE modernization of the procedure of the courts of this country has taken such a firm hold upon the people, as well as the bench and bar, that it will undoubtedly become a political issue unless Congress gives it the respectful consideration it requires. No fate could be more regrettable. It is interesting to observe that the aimless criticisms of ten years ago have been converted by the American Bar Association's activities into a formal program for scientific relief so that, upon suitable action by Congress, American juridical and judicial conditions may rank with those of any nation on earth; to the end that "law may be a science and justice a reasonably certain measure."

Daniel Webster, repeating an age-old sentiment, declared that "justice is the greatest interest of man on earth." Had he lived during the past eight years a revisal of his views so far as the Senate Judiciary Committee is concerned might have been pardonable. The American Bar Association, upon becoming thoroughly awake to the present procedural muddle provided by Congress and its obvious cause, of which universal complaint is made, gave mature consideration to the unsatisfactory condition and agreed upon a scientific program that would assure relief. It requires only the enactment of a short bill, which for information is appended hereto. For eight years that bill, although having the unanimous approval of the American Bar Association, forty-five State Bar Associations, the Deans of the Law Schools and many civic and commercial organizations, with one futile exception, has lain in the Senate Judiciary Committee. Senator George Sutherland, while a member of the committee, managed to procure a report on it at one session but it was too late for a vote to be reached on the floor before final adjournment of Congress.

Now this is true, although a substantial majority of the members of the Senate Judiciary Committee, as well as other Senators, kindly gave assurance of their earnest desire to see the bill enacted. The fact that they have always been most kind and considerate tends to deepen the puzzle of delay. It seems, however, that the personal objection of two, and probably one Senator has been sufficient to pigeonhole the bill against the unanimous voice of seven-eighths of the lawyers of America. On the other hand, the Judiciary Committee of the House favorably and promptly reported it by a unanimous vote, but the House Leaders, upon learning the condition in the Senate, frankly pointed out the uselessness of bringing about further action by the House. In this view all of us felt obliged to agree. "It would have been a waste of time," said Edwin Y. Webb, then Chairman of the House Committee.

This action of the Senate Judiciary Committee has occasioned much comment throughout the country. It was thought in many quarters that there was lacking a suitable consideration, respect and a sense of fairness due to their fellow lawyers, as well as to their constituents by the statesmen of the Senate Judiciary Committee, particularly when a substantial majority favored the bill and there was a militant demand for it by the country. Many persons have felt it to be a reflection upon the lawyers that might ultimately become an issue before the people, for it is doubted if any legislation ever received such a substantial popular support without reference to politics, religion or any other influence. Roosevelt, Taft and Wilson all favored the legislation.

But observers of the processes used to encompass an end, during the past years of close political divisions, give full value to the power of senatorial courtesy and understand how its warmest advocates are often justifiably obliged on occasion to forego pressing a non-partisan bill even at the objection of one Senator. It ought to be said in this connection that a proper administration of justice is as highly prized by the statesmen of today as of Daniel Webster's time, however much appearances may be against them. This statement will soon be vindicated, for the old conditions, fortunately for the good name of American jurisprudence, cannot arise at the coming

session. The improvement of the administration of justice in America is assured.

The bill will be reintroduced at the Special Session, in the Senate by Senator Frank B. Kellogg and in the House by Congressman Andrew Volstead, Chairman of the House Judiciary Committee. It is the identical bill introduced by Senator Culberson and Congressmen Clayton and Webb. The House, conscious of the old conditions in the Senate Judiciary Committee, as has been explained, realized the uselessness of enacting the bill, and for that reason has waited on the Senate. The House may now proceed with full confidence that the Senate will be given by the Judiciary Committee of that body an opportunity to vote on the bill and we are assured that Judge Volstead now feels justified in proceeding without delay.

Every judge and lawyer and special committee appointed for the purpose should proceed at once to let his voice be heard by his Senators and Congressmen, although the Committee on Uniform Judicial Procedure, with its many friends, will follow the advice of Judge William Howard Taft and continue persistently at work.

Said President Taft in his annual address before the American Bar Association (A. B. A. An. Rep. 1914, p 381):

> I regret to say that the earnest efforts of Mr. Shelton and his Committee on Uniform Judicial Procedure to secure the passage of a bill entrusting the Supreme Court with the power to make rules for the procedure in common law cases in the federal courts have not thus far been successful. The Judiciary Committee of the House reported the bill favorably, as it has nearly all the Bar Association's bills. But the pressure upon Congress for other measures, thought by the leaders to be more important, has prevented the passage of the bill. Of course, we must not be discouraged by this delay. We must continue to urge the reform.

The lawyers have been faithful, long suffering and patient, but now is the opportune moment for both individual and concerted militant action and for that support the Committee now makes an urgent appeal. It is a test, in fact, of the respect of Congress for the organized lawyers of America and their usefulness to society.

This bill should be passed in the shortest time. It has been so long before Congress (eight years) that it is familiar to every statesman. Its purpose and effect is to give to the Supreme Court of the United States the authority to make rules governing the procedure in *cases at law* to the same extent that it now has power to regulate the procedure in equity, admiralty and bankruptcy. Nothing novel is involved.

To the student it is the key that will unlock the door to a new era of scientific judicial relations. *It will set the judges and lawyers free to perfect the machinery of the courts for which they are obviously held solely responsible by laymen.* Congress at present receives no censure while it is wholly responsible for bad procedural conditions. It is the principle adopted by England more than fifty years ago. Upon the passage of the bill a united bench and bar will cooperate with the Supreme Court in first constructing and then in gradually perfecting a simple, correlated, scientific system of rules of procedure and practice, in lieu of the present complicated so-called "federal practice." It is intended that this system of rules shall embrace all the merits and none of the vices of both "common law" and "code" pleading.

Its featural merit will be a patriotic effort to administer, instead of impeding, justice by *the lawyer who is now sworn to uphold all procedural statutes, as well as those of substantive law, although they obstruct justice.* This is really the crux of the plan. for judicature would then be enabled to command and would then receive the aid and sympathy of the lawyers instead of an enforced hostility. They would actually be members of the court. Moreover, the criticism of laymen would be directed in a harmless manner to a personally responsible and responsive agency, ready to afford *instant relief* against procedural hardships.

### An Analysis of the Effect of the Statute

The trouble with the procedure of the courts is due to the fact that co-ordination between these two departments of government has been destroyed by exclusive legislative control. This evil was feared by every member of the Federal Constitutional Convention (Madison's Notes). The proposed bill would vest in the Supreme Court the exclusive power to prepare for the trial courts all necessary rules and regulations and gradually perfect them. It divides all judicial procedure into two classes, viz.: (a) jurisdictional and fundamental matters and general procedure and (b) the rules of practice directing the manner of bringing parties into court and the course of the court thereafter. The first class goes to the very foundation of the matter and may aptly be denominated the legal machine through which justice is to be administered, as distinguished from the actual operation thereof, and lies exclusively with the legislative department. It prescribes what the court may do, who shall be the parties participating, and fixes the rules of evidence and all important matters of procedure. The second concerns only the practice, the manner in which these things shall be done, that is the details of their practical operation. Concisely stated, the first or legislative class provides what the courts may do, while the second or judicial class regulates how they shall do it. *It is desired to be emphasized that the statute will necessitate no alteration of the present procedure upon any jurisdictional or fundamental matter; that the Congress can repeal it at its pleasure and that the proposed rules will not have the effect of a statute.*

### The Benefits to Be Derived

The benefits to be derived from this course may be summed up as follows, viz.: (1) A modernized, simplified, scientific, correlated system of federal procedure meeting the approval of the Federal Supreme Court and participated in by the judges and lawyers. (2) The improvement of state court procedure through the adoption of the federal system as a model. (3) The possibility and the probability of state uniformity through the same course. (4) The institution of court rules in lieu of the statutory or common law procedure or common law procedure modified by statute, and (5) the foundation for fixed interstate judicial relations, as permanent and correlated as interstate commercial relations. (6) The advantage of the personal participation of the lawyers and judges in the creation and gradual perfecting of a scientific system of rules. (7) The certainty of immediately detecting an imperfection and the promptness with which it can be corrected. (8) The doing away with the long time now necessary for the simplest relief at the hands of Congress because of the multitude of other business pressing for attention upon that great body of states-

men. (9) The doing away with the force of law now possessed by every procedural statute and the substitution therefor of a system of flexible judge-made rules, not liable to reversible error if justice be done by the judgment entered. (10) It is the only way that nation-wide uniformity is possible, and yet not compulsory, the psychology of which is important where state pride is an element. (11) It will awaken a keen sense of responsibility and a new and an unselfish participation on the part of the members of the bench and bar. (12) It will create an equable division of power and duty between the legislative and judicial departments of government.

### The Form of the Bill

While we shall not know the number until the bill is reintroduced at the Special Session, the exact form is as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Supreme Court shall have the power to prescribe, from time to time and in any manner, the forms of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; drawing up, entering, and enrolling orders; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law of whatever nature by the district courts of the United States and the courts of the District of Columbia. That in prescribing such rules the Supreme Court shall have regard to the simplification of the system of pleading, practice, and procedure in said courts, so as to promote the speedy determination of litigation on the merits.
>
> Sec. 2. That when and as the rules of the court herein authorized shall be promulgated, all laws in conflict therewith shall be and become of no further force and effect.

### A Specific Appeal for Help

The Committee on Uniform Judicial Procedure makes an earnest appeal to every judge and lawyer and Bar Association for specific help, viz.: (1) that they will at once communicate with their Senators and Congressman, request the enactment of this bill at the Extra Session and obtain an expression from each of them. The list of the members of the Senate Judiciary Committee will be published in the Bar Association Journal immediately upon its announcement in April, but communications to Senators and Congressmen should not be delayed for that reason. If these things be done, there is no doubt of the passage of the bill and its prompt approval by the President. Every President and Attorney General from Mr. Roosevelt to the present day and a substantial and growing majority in both Senate and House have approved the bill.

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## RENT REGULATION AND THE NEW YORK DECISION

An important decision in the field of rent regulation was rendered by the Court of Appeals of New York on March 8, 1921, in the case of People ex rel Durham Realty Corporation vs. La Fetra. The Court in this case, with one dissent, upheld chapters 942, 944 and 947 of the laws enacted at the extraordinary session of the New York Legislature in September, 1920. The theory back of these laws is that of keeping tenants (if not undesirable) in possession within a period limited to November 1, 1922, and of vesting in the courts the determination as to the reasonable rental upon which the tenants are to be so kept in possession. That is, the New York legislation is rental regulation primarily by judicial determination.

The legislation by Congress for the District of Columbia (Ball law) and the legislation of Wisconsin for Milwaukee County proceed, on the other hand, upon the plan of setting up an administrative commission for the preliminary determination of the reasonableness of rental upon which a tenant may be kept in possession, the determination of the administrative body then being subject to judicial review. In general constitutional theory, both types of legislation rest upon the same basis, and the final determination of the power of the New York Legislature in this respect has an important bearing upon legislation not only in New York, but also in Massachusetts, which has copied her legislation largely from New York; and for Wisconsin and the District of Columbia, whose legislation has proceeded upon the plan of setting up rental commissions.

The case of Hirsch v. Block, in which the Court of Appeals of the District of Columbia declared the rental commission act for that District unconstitutional, and the New York cases upholding the New York legislation have been taken to the Supreme Court of the United States. Two of these cases have been argued and submitted and are now under advisement by that court. Should the United States Supreme Court declare that the regulation of rental is a deprivation of due process of law, or a denial of equal protection of the laws, or a violation of obligation of contracts under the constitution of the United States, such a decision would, of course, end for the whole country the recent movement for the regulation of rentals during a period of emergency.

Should the United States Supreme Court, on the other hand, declare that such legislation is constitutional, this will establish the constitutional right of Congress with respect to the District of Columbia; and the constitutional right of state legislatures, so far as such constitutional right depends upon the Federal constitution. Should the United States Supreme Court decide in favor of the New York legislation, this, however, leaves the question of constitutionality in any particular state to be decided by the highest court of that state, upon the basis of state constitutional provisions substantially identical with the limitations of the Federal constitution.

In the decision of such an issue by a state court as to the interpretation of the language of a state constitution, the state court will naturally be to a great extent influenced by the decision of the United States Supreme Court. The attitude not only of the United States Supreme Court, but also of the highest court of the most populous state in this country will be of distinct influence upon the courts in other states which have enacted or which may this year enact legislation for the regulation of rentals. In view of the present situation, the decision of the United States Supreme Court will be awaited with great interest.

# JOURNAL

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## JUSTICE OR WAR

Without expressing anything but complete accord with the conclusion reached by the majority in the Duplex Printing Press Co. case against certain officers of the International Machinists Union, we cannot refrain from calling the attention of the profession to the service which Mr. Justice Brandeis has rendered to the judicial institution by his clear exposition of the present relation of the courts to controversies regarding terms and conditions of employment, and the responsibilities which rest upon society for its failure to "substitute processes of justice for the more primitive method of trial by combat."

Man is a fighting animal and because of this attribute he has risen to the mastery of the animal kingdom. A man who will not fight in protection of his just rights, and those of his children and his country, is looked upon with contempt by his fellows. There has never been found but one way to prevent this natural tendency of man. That way is to create an appropriate judicial tribunal—one which will be so constituted that it can and will protect and establish the rights of each of the contending parties—to compel the submission of disputes to such tribunal, and to put behind its decisions all the force of society. In every field of human existence where this simple thing has not been done, men still fight. Wherever it has been done, and wherever the tribunal has won the confidence of society, private war has ceased.

Is this method applicable to the adjudication of disputes concerning the terms and conditions of employment?

The answer to this question has not yet been worked out, for the method has not been tested.

Arbitration, where each of the contending interests names one arbitrator and the two thus chosen select a third, is a different method and one which is destructive of the judicial attitude. Two members of the board of arbitration are advocates, and even if the third member chosen by them were of the most ideal judicial temperament, the environment in which he is compelled to act is not conducive to the performance of judicial duties. Moreover, such substitutes for a true judicial tribunal have been tried and found wanting. They do not command that prime essential—the confidence of the contending parties.

The same must be admitted as to the ordinary courts of the land. No such broad power has been committed to them as to allow them to work out all the phases of such controversies. They have been permitted only to interfere in limited measure, and, perhaps for this very reason, it has been objected "that due largely to environment, the social and economic ideas of judges * * were prejudicial to a position of equality between workingman and employer."

There is therefore no hope of any cessation of the present state of class war until a special form of tribunal, purely judicial in its character, is devised and given jurisdiction to decide controversies of this class, and proves itself capable of performing its great task.

If employers and employees cannot see the advantage to themselves of cooperating in the creation of such a tribunal, those who are not parties to the quarrel, but who are in a real sense its victims, may well ponder these impressive words of Mr. Justice Brandeis:

*"The condition developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community."*

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## STATE INCOME TAX CASE

A controversy among the different cities and towns of Massachusetts over the distribution of the proceeds of the state income tax, which will be heard by the Supreme Court of the United States this month, is of unusual interest because of its unique character and the effect which it may have in other jurisdictions. Most of the states in which an income tax is in force treat the proceeds of the tax as strictly state revenue; in others, however, it is in part at least a source of municipal revenue, and the state merely collects the tax and distributes the proceeds to the counties, cities and towns. Under normal conditions each municipality would, as a matter of course, receive back the tax collected from its own inhabitants; this is the rule

in Alabama and Wisconsin, for example. In Massachusetts, however, local conditions are peculiar, owing to the persistence of old town lines, so that what really amounts to one community is often divided into several independent municipalities. As a result, Massachusetts towns are sharply divided into two classes, residential, and manufacturing or commercial. While the general property tax at a uniform rate prevailed, although the manufacturing or commercial towns included the more valuable classes of real estate, this advantage was in many instances more than counterbalanced by the great masses of taxable securities owned by the inhabitants of the wealthier residential towns.

In 1916 an income tax law was enacted; but it did not provide for a general income tax; its most important clause provided merely for the taxation of dividends on stocks in foreign corporations and interest on bonds and notes (except real estate mortgages) on an income basis at a uniform rate, in place of the tax on the capital from which this income was derived at the varying local rate. The tax remained a municipal revenue, although collected by state officials, and there was distributed to each municipality the amount which it had previously received from the direct tax on the securities now made subject to the income tax. Real estate and tangible personal property continued subject to taxation on capital value by the towns where they were located.

In 1919 the commercial and manufacturing towns secured the enactment of legislation providing for the distribution of the proceeds of the income tax to the various municipalities in proportion to the taxable value of their real estate. This completely reversed the situation. The residential towns, because of the fact that they contain the less valuable class of real estate and derive less revenue from that source than the commercial centers, under the new law also receive less revenue from intangibles and are placed at a great disadvantage. Thus Brookline, a residential suburb of Boston, overnight lost half its taxable property, and although the town pays in over a million and a quarter in income taxes annually, it receives back only a quarter of a million; the rest goes to such prosperous commercial centers as Worcester and Springfield, which, on account of the valuable business blocks and factories which they contain and the high value of land in their business districts, receive back far more than they pay in.

Certain taxpayers of Brookline contested the constitutionality of the new method of distribution, relying on the due process and equal protection clauses of the Fourteenth Amendment, and the case has reached the Supreme Court of the United States. The outcome is awaited with interest, not only because the New York income tax law has a distribution clause somewhat similar to that in force in Massachusetts, though far less subversive of the existing relative financial standing of the towns, but also because of the possibility that a decision upholding the act might lead to the enactment of a Federal law levying a tax on the income of intangibles for distribution among the states in proportion to the value of their real estate, which would be a step beyond the distribution provisions of the Smith-Towner bill now before Congress. If such should be the result, Massachusetts and New York would have cause to regret having brought such a system of taxation into public notice.

## METHOD OF SELECTING COUNCILS

In the July (1920) issue of the Journal certain amendments providing for a change in the method of selecting members of the General and Local Councils were published. They were discussed at the Open Forum at the St. Louis meeting, but no action was taken. Since their publication it is understood that a large number of members of the Association have manifested a keen interest in the subject. The appointment of a committee composed of three members of the Executive Committee to investigate the question further and report affords all who wish to do so an opportunity to submit any original suggestions they may have in mind or to express approval or disapproval of the changes already proposed. Correspondence may be directed to the Chairman, Hon. Thomas C. McClellan, Montgomery, Ala.

## A CORRECTION

In the March issue of the Journal was printed an article of special interest and merit, on the recent act of the Kansas legislature in respect to declaratory judgments. The writer of that article made it perfectly clear that he was discussing an act of the legislature and not the decision of a court. Our editorial comment on that article erroneously referred to it as a review of a decision of the Kansas Supreme Court.

The statute has not yet been passed on by the court and apologies are hereby tendered to the author and the court.

CONTRIBUTIONS OF THE SECTION OF COMPARATIVE LAW OF THE AMERICAN BAR ASSOCIATION

*(Pages 170 to 204, inc.)*

# ORGANIZATION AND WORK OF SECTION

The objects of the Bureau, now Section, include the translation into English of foreign laws, the preparation of bibliographies in its special field, and the consideration of foreign legislation and jurisprudence with a view to present information and materials of value to lawyers, law teachers and law students.

All members of the American Bar Association and of the Comparative Law Section will receive the JOURNAL issued by the American Bar Association.

All members of the Association are by that fact also members of the Section. Any state bar association can become a member on payment of $15 annually, and will then be entitled to send three delegates to the annual meeting of the Section and to receive five copies of the American Bar Association JOURNAL. Any county, city, district, or colonial bar association, law school, law library, institution of learning or department thereof, or other organized body of a kind not above described, may become a member on payment of $6 annually, and will then be entitled to send two delegates to the annual meeting of the Section and to receive two copies of the JOURNAL. Any person eligible to the American Bar Association, but not a member of it, can become a member of the Section on payment of $3 annually, and will then receive the JOURNAL.

Distinguished foreign jurists, legislators, or scholars may be elected honorary members. They pay no fees.

The authorship of the contributions of the Section to the JOURNAL is indicated in each case by the initials of the writer.

The next meeting of the Section will be held at Cincinnati, Ohio, at 2 P. M., Wed., Aug. 31, 1921.

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### Comparative Law Bureau Publications

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Visigothic Code, by Scott, of this Editorial Staff.
Swiss Civil Code, by Shick and Wetherill, of this Editorial Staff.
Civil Code of Argentina, by Joannini.
Civil Code of Peru, by Joannini; in preparation by this Bureau.
The Seven Parts (Las Siete Partidas), by Scott, of this Editorial Staff; in preparation by this Bureau.

### Foreign Codes and Laws Translated Into English—Now Purchasable

French Civil Code, by Cachard.
French Civil Code, by Wright.
Japanese Civil Code, by Gubbins.
Japanese Civil Code, by Lonholm.
Japanese Civil Code, annotated by De Becker.
Japanese Commercial Code, by Yang Yin Hang.
Japanese Code of Commerce, by Lonholm.
Japanese Penal Code, by Lonholm.
German Civil Code, by Chung Hui Wang.
German Civil Code, by Loewy, under the direction and annotated by a joint committee of the Pennsylvania Bar Association and the University of Pennsylvania.
Penal Code of Siam, by Tokichi Masao (18 Yale Law Journal, 85).
Laws of Mexico, by Wheless, of this Editorial Staff.
Mining Law of Mexico, by Kerr, late of this Editorial Staff.
Mining Laws of Columbia, by Eder, of this Editorial Staff.
Commercial Laws of the World, Am. Ed., Boston Book Co.
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# THE SUPREME COURT OF FRANCE

By JOHN F. C. WALDO
*Of the New Orleans, La., Bar*

SOME details concerning the Court of Cassation, as the Supreme Court of France is called, may not be uninteresting at the present time. The word *"casser"* comes from the Latin *quassare*, frequentative of the verb *quatere*, to shake, and means to shake or break to pieces, to shatter, to smash. As a law term it means to annul, and may be represented also in English by the word *quash*. The court is so named because, broadly speaking, it annuls or quashes erroneous judgments rendered by inferior tribunals in certain classes of cases, and remands the cases to be proceeded with anew wholly or partially; but does not render substitute judgments between the parties to be executed by the courts *a qua*.

It is the successor of the King's Council of former times, especially of that assembly or department of the State Council called the *conseil des parties*, or the *conseil privé*, whither were brought certain contentious affairs of the subjects of the king, that had a particular relation to the maintenance of the laws and ordinances and judicial order; such as demands for annulment of the decrees of the higher courts, conflicts between the courts themselves, contestations and regulations among them or among their principal officers, and other matters which only the king could decide.

The Court of Cassation at the present time is still largely governed by the provisions of the ancient ordinances enacted by the kings to regulate the jurisdiction and procedure of the council; these provisions being preserved or adopted in great part by the subsequent legislation.

The author of the article *"Cassation"* in the *Encyclopédie Méthodique*, published in 1783, which I possess fortunately, naïvely says:

> Cassation is an extreme remedy which can have for its sole object the maintenance of legislative authority and the ordinances. It cannot be used under pretext that the merits of a matter have been wrongly decided, otherwise demands for cassation would be as common as appeals from the decrees of judges of the courts of first instance: this would cause many inconveniences.
>
> In order that a judgment may be subject to cassation, it must formally contravene a definite law in force.
>
> Cassation is also a proper remedy when two decrees, one in direct contradiction of the other have been rendered between the same parties, either by the same court or by different courts; also in a case of usurpation of jurisdiction, or when the procedure prescribed by the regulations has not been followed.
>
> Before seeking cassation of a decree, it is necessary to examine attentively the matter decided. If it is a question of fact, there is no room for application of the remedy of cassation, because the judge, having no statute to be guided by, can pronounce according to his lights,—except where the decree errs by defect of essential formality. But where it is a point of law that is in question, which has been *decided* by some provision of law actually in force, there is ground for cassation, when the judge has departed from it; because it is his duty to apply the law, which he is not permitted to interpret, still less to contravene, and according to which he is obliged to pronounce.
>
> Nevertheless, however strict may be the obligation imposed upon the judge not to depart from the law, it is extremely difficult to quash a decree of sovereign courts. Three circumstances shelter them from cassation. First, when it is a question of fact; second, when the law, upon which one relies, has no direct application to the point of law that has been decided; third, when although the law is the very matter concerned, it is only directory.
>
> In demands for cassation only the interest of the law is consulted, and a decree is quashed only to avenge the contempt and violation of the law itself by the judge. This is why the Council of the King judges the decree only, and that, when annuling it, it sends the parties before another tribunal there to proceed in the prescribed way.

The plaintiff in cassation was required to deposit a penal sum of 50 livres or 75 livres accordingly as the judgment had been rendered contradictorily or by default, which sum was forfeited to the king, if the appellant failed in his demand, but restored immediately to him in case he was successful.

The appellant's petition together with its justificatory documents was referred by the Chancellor or Keeper of the Seals to the Master of Petitions for report.

The Court of Cassation was organized by decrees of 27th November and 1st December, 1790, and originally styled "Tribunal of Cassation." It is not ambulatory as was the King's Council, and its seat is fixed at Paris. It now consists of 49 members, including the First President and the Presidents of the three sections or chambers into which the court is divided. The members are appointed for life by the executive, and are recruited generally among the first presidents and *procureurs généraux* (chief attorney generals) of the courts of appeal, professors of the law schools, high functionaries of the ministry, and the lawyers (*avoués*) near (accredited to) the Court of Cassation.

The Court is divided into three chambers, formerly called sections, each of 16 judges, viz., Demands or Petitions (Requêtes), Civil, Criminal.

> The first shall pass upon the admission or rejection of demands to quash or *en prise à partie* (actions where the judges are made parties because of wrongdoing, etc.), and definitively upon rules of the courts, and transfers from one court to another. The second shall pronounce definitively upon demands to quash or for *prise à partie*, where the demands have been allowed. The third shall decide in criminal, correctional, and police matters, without necessity of previous judgment of admission. Ord., 15, Jan., 1826.

The appeal in matters of expropriation to public use and elections is now directly to the civil chamber without having gone through the chamber of petitions.

The chambers sit separately; but they sit together in cases of great difficulty, or when a judgment rendered by the lower court after remanding has been attacked on the same grounds as the first judgment. When united in solemn audience under presidency of the Minister of Justice, the Court possesses the power of censure and discipline over all judges for grave offenses not specially provided for by law, and may suspend judges of the ordinary courts from the exercise of their functions, and summon them to its bar.

The presence of eleven members is necessary at a session of each chamber for a hearing and decision of a case. In the event of absence of a quorum others from a chamber not in session are called in according

to seniority, which is determined by the date and order of nomination. A somewhat similar proceeding, by selection of members who have not previously discussed the case, is followed in event of a division among the counselors or judges. Each decision requires an absolute majority of votes.

The Civil Chamber and Chamber of Petitions each take annually a short vacation; the Criminal Chamber takes none as a body.

At one time the law required three hearings of four hours in each week on such days as the court should fix; whether this is still the rule the writer does not know.

There is a general register or docket for the whole court; and each chamber has its own preference (urgent) and ordinary rolls or dockets.

Civil appeals are effected by filing in the clerk's office of the court a petition, signed by an attorney accredited to the court, and containing the grounds for cassation, a statement of the dispositions claimed to be erroneous in the judgment attacked and the texts of the law claimed to have been violated.

The procedure before the Chamber of Petitions is not contradictory; the complainant cites his adversary to defend or answer only when, after a favorable examination of his documents, reference to the Civil Chamber has been granted. The decree of admission or allowance must be notified absolutely to the appellee within three months following its rendition. The Chamber of Petitions gives reasons for its decision only when it rejects the petition or demand.

In each chamber the case is first submitted to one of its members for report or summary. On filing of the report in the clerk's office, the papers are sent to the *procurateur-général* (attorney-general), who turns them over to an *avocat-général* (assistant attorney-general) for an opinion. The report is read on the hearing, the reporter being present and sitting with the court. The lawyers of the parties (or parties themselves by permission of the court) are then heard, but cannot speak or argue after the representative of the government has spoken, except when the procurateur-general, for the government, is the party-plaintiff.

In civil cases the appeal is suspensive only in suits for divorce and *accusations de faux* (charges that documents forming part of the other party's evidence are false or have been altered). As in former times deposit of a penal sum is prerequisite.

The grounds for cassation may be resumed into the following: violation of essential forms; violation and erroneous application of the law; error of law and fact when the latter arises from authentic acts which establish the evident inadvertence of the judge; judicial incompetency or usurpation of jurisdiction; exceeding judicial power—refusing to render judgment in a case where the law obliges the judge to decide; violation of the thing adjudged; contrariety of decisions, but only when rendered in last resort in the same matter between the same parties.

When the decree of a judgment is annulled by the civil chamber the cause is remanded to a court of the same order but other than the court from which the appeal was taken. This tribunal, however, is not bound by the higher court's conception of the law; but if its judgment in turn is annulled for the same reasons as that of the first court, the tribunal, to which the cause is finally sent, is obliged to conform to the decision of the Court of Cassation (rendered in such instance, as before said, by its united chambers) upon the point of law involved. Even then the decision of the higher court is not binding for the future or upon other courts. When, in a civil case, the procedure alone has been held defective, it must be begun anew from the point where the first rule or form was not observed.

I subjoin the text of a decision of the Chamber of Petitions rejecting the petition of Michel and Piedevache for the annulment of the judgment of the Royal Court of Rennes rendered in favor of the City of Rennes; a decision which I vainly tried to have the United States Court of Appeals for the Fifth Circuit follow in the application of an article of the civil code of Louisiana.

The City of Rennes contracted with Michel and Piedevache for the construction of a bridge in continuation of Berlin Street across the river Vilaine, which flows through that city. When nearly completed, the bridge collapsed. The city brought suit in the local tribunal to have the contractors condemned to reconstruct the bridge at their own expense.

The defendants excepted to the competency or jurisdiction of the court, averring the case to be only within the jurisdiction of the council of the prefecture, as in accordance with a stipulation of the contract. This exception the tribunal overruled; holding jurisdiction to be a matter of public order and not of private agreement. On the merits it was held that the loss and damage accrued were upon the contractors; but that the resolution of the question as to the new erection of the bridge should be postponed until report of experts to be appointed by the tribunal to determine whether or not the bridge could be built under the specifications.

Michel and Piedevache appealed to the Royal Court of Rennes, and the City of Rennes took a cross appeal.

The Royal Court held that as to the principal appeal, inasmuch as the undertaker contracted to do the work by the plot or job and to furnish all the materials, the ownership of the work was in the workman until completion and delivery to the master, or tender to and refusal by him; that the maxim *res perit domino* had been formally consecrated by article 1788 C. civ. (same as article 2759 R. C. C. of La.); farther, that defects in the plans could not be a defense, since the plans and specifications had been adopted by the contractors as their own.

On the cross appeal it was held, that the *ex proprio motu* appointment of experts by the tribunal was erroneous, inasmuch as the plans and specifications had been examined and approved by members of the art and by the Supreme Council of Bridges and Highways.

Michel and Piedevache petitioned the Court of Cassation, and assigned as errors, First, Violation of the laws whereby cognizance of contests relative to the execution of public works was attributed to the administration, the executive branch of the government; Second, Misapplication of Article 1788 C. civ.

## THE DECREE

3 March, 1839. Decree of the C. Cass. ch. req. 1. M. M. Zangiacomi, pres., Felix Faure, rep., Hébert, Atty. Gen., Ledru Rollin, counsel.

The Court.—As to the first error founded upon the violation of rules fixing the separation of administrative and judicial powers; inasmuch as it is manifest by the decree attacked and the judgment of the tribunal of Rennes appealed from, that the bridge, whose construction is in question, made part of the local ways; that in the contract entered into on the occasion of the construction of this bridge between the plain-

tiffs and the mayor of the city of Rennes, the latter acted not as the representative of the higher administration, and in the name of the state, but solely in the name and in the interest of the inhabitants, at whose expense the bridge was to be constructed; and that in deciding under like circumstances that the demand relative to the performance of the said contract or for damages in consequence of the collapse of the bridge was within the jurisdiction of the tribunals, the Royal Court of Rennes has violated neither the principles applicable to the subject matter nor the laws invoked by plaintiffs.

As to the second error.—Inasmuch as the decree attacked finds as facts, first, that the undertakers were obligated by their contract to furnish all the materials; whence the consequence that these materials were their property so long as the bridge was neither finished nor delivered; second, that the undertakers had cognizance of the plans and specifications, and that they adopted them by binding themselves, without reservation or objection whatsoever, to execute the work of the bridge conformably to the said plans and specifications; that this finding of facts is absolutely conclusive upon the parties, and in deciding as to the law, in view of these facts, that the loss resulting from the collapse of said bridge, neither completed nor delivered, should be borne by the undertakers, the Royal Court of Rennes has made a just application of Art. 1788 and 1792 C. civ.

Rejected.

Journal du Palais, Tome 1 of 1839, 3 Ed. p. 371 **et seq.**

# THE PRESENT VALUE OF COMPARATIVE JURISPRUDENCE

By C. E. A. BEDWELL

*Keeper of the Middle Temple Library, London*

THROUGHOUT the proceedings of the Peace Conference the delegates of the British Empire stood on more than one occasion as conciliators of different views held by representatives of the United States, France and Italy. Similarly it may be that the legal system of the British Empire has a corresponding function to fulfill in bringing about a rapprochement between the legal systems of the United States and European countries. The affinity between the English-speaking peoples based upon the strong attachment to the English common law and its great traditions is so strongly embedded in the life of the nations that its permanency seems to be secure. But the development of international relations may naturally arouse a desire among the jurists as well as other citizens of the continental countries for closer union with English lawyers. It is meet and right that this desire should receive cordial reciprocity. Professor Lambert of the University of Lyons has given expression to it in a monograph on the teaching of comparative law to which he gives the sub-title: *sa co-opération au rapprochement en la jurisprudence française et la jurisprudence anglo-américaine*. The learned professor fully appreciates the binding force of the English common law but at the same time he directs attention to its French foundations. When the parting of the ways between the French and English systems took place at the end of the thirteenth century it was as Pollock and Maitland observed:

> Not about what may seem the weightier matters of jurisprudence do these sisters quarrel, but about "mere matters of procedure" as some would call them.[1]

There remains, therefore, an affinity between the systems of French and English law. Whatever may be the practical value in the present day of the historic connection, there are certainly opportunities for closer cooperation between lawyers on both sides of the Channel as there are on both sides of the Atlantic.

Professor Lambert is concerned with the subject more particularly from the point of view of a professor in one of the great French Universities. He desires to see the University Library equipped with the statutes and reports of the United Kingdom and United States so that students of the University may have more opportunity to broaden their knowledge. Professor Levy Uhlmann of Liége University in an admirably informed paper[2] read before the French Society of Comparative Legislation has put the matter in a more practical form and appealed to the English Society to provide the material, especially by means of a bibliography of English law, so that the student in France or other countries may be assisted to study either the main principles or the special branches of English law. With this plea from the point of view of the French University Professor may be associated the admirable paper read by Professor Cammeo of Bologna University upon the nomination of the Italian government before the American Bar Association.[3] At that time the war was taking the most prominent place in the minds of all men, but the prescience shown in the selection of the subject, having regard to the problems which would arise "from the settlement that the nations will require when the battle is over," is now apparent. One of the first practical results of the Peace Conference was the establishment of a permanent organization for the internal regulation of labor conditions. The preamble to the convention gave some ideas of the wide range of subjects which will come within its purview. They include:

> The regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of the workers when employed in countries other than their own, the recognition of the principle of the freedom of association and organization, of technical and vocational education, and other measures.

Thus the laws of all the signatory countries bearing upon the relations of employers and employed will come under review, and it is proposed to publish in English and French a periodical in which all problems relating to the international character of industry and employment will be discussed.[4] The need for a more comprehensive publication is obvious, since even to the best informed mind a collection of documents cannot take the place of a reasoned consideration of a sub-

1. Pollock and Maitland, History of Eng. Law (2nd ed. 1899), 673.

2. Bulletin Mensuel de la Société de Legislation Comparée, Nos. 1, 2, 3, (1919), 64.

3. 43 Reports of American Bar Association, (1918), 303.

4. Presumably this publication will take the place of the Bulletin of the International Office formerly published in Switzerland and now issued from Paris, which contains only the texts of law and a bibliography of the literature on the subject.

ject. The monthly review of the Bureau of Labor Statistics of the United States Department of Labor is the kind of publication for which the international organization should make itself responsible, and Washington as its first place of meeting was the obvious choice. But in order that its influence and the work of the international body as a whole may be effective it will be necessary for each signatory to have a corresponding body and organ for the enlightenment of public opinion upon the great problems of labor not only of its own country but of others which are allied with it. The workingmen and employers of Great Britain in making changes will need to appreciate the effect if they desire them to be adopted readily in Japan or Italy. There will be a special presentation of the problems considered by the international body to be submitted to each country in accordance with its own particular needs. Unity of action based upon common guiding principles will not necessarily involve a stereotyped uniformity of legislative convention, so that the divergencies of each will be of interest to the others.

Although labor problems will be among the most important matters upon which the permanent Secretariat will require information, there will be a number of others.[5] Mr. Reinsch in his admirable treatise upon Public International Unions[6] has set forth details of the various bureaux which had been formed for dealing with matters of communication, economic interests, sanitation and prison reform, police powers and scientific purposes. He writes:

> The bureau is the connecting link between the various national administrations. It furnishes them information about the interests of the particular union, acts as intermediary between the governments, and carries out the specific administrative duties assigned to it in the règlement.[7]

The bureau not only collects but also disseminates information. It is reasonable to anticipate a development of its activities under the new régime. Transport is one of the most important matters to receive international attention. Already an international aircraft convention has been one of the first subjects upon which general agreement was necessary before development in each country could make progress. Similarly further advance may be expected in the efforts already made to unify maritime law and the law relating to transport by land. The duties of a common carrier have already been defined so as to exclude national differences of interpretation and can be enforced in points that concern the acceptance, care and delivery of merchandise. An allied subject which will come within the purview of the International Transit Commission is the law regulating transport by river.

While, however, Professor Cammeo recognized that the constitution of the League of Nations would lead to a more general movement for the unification of law he considered that it must not go further than is required for the purpose of securing unity among the nations upon essential points. He said:

> I take it for granted that those branches of the law which are strictly connected with, and dependent upon, the main features of each nation that go to the root of its more peculiar ethnical historical, political, economic tendencies, will remain outside the scope of unification. So it will be for constitutional law, for the law of domestic relations, for that of tenure of land, and of inheritance; for criminal law and for procedure, civil and criminal. The work of unification, I believe, will be confined to the law of ownership of moveable things, to the law of contract and torts, to commercial and maritime law, and to some points of that branch of public law, which on the European continent is called administrative law. To sum up, I deem that unification should reach every field of law directly or indirectly connected with international trade. A world-wide trade will require world-wide legislation.[8]

Though direct efforts to secure greater uniformity of legislation may be limited within the sphere suggested by Professor Cammeo there is no necessity for the student of comparative legislation to impose any such restraint upon himself. Comparative legislation, forbidding though its name is to the ordinary man, is commending itself to his approval by the extent to which it is assisting him to deal with the ordinary practical affairs of every day life. In such matters as infant welfare legislation, which closely affects family life, the experience of one country is of considerable importance to the advocates of reform in other countries. The law of domestic relations to which Professor Cammeo especially alludes happens to provide an example of the way in which the continental system of law supplies a suggestion to fill a serious gap in the Anglo-American system of law.

The care of the children of the men who gave their lives in the military service of their country is one of the first duties of the State at the present time. The English law only regards the father's death in the same way as the popular phraseology, which describes it as the "loss of the breadwinner." It takes little or no interest in the orphans unless they are possessors of property, though the old custom of the City of London by which all orphans of freemen became wards of the Orphans Court of the Corporation serves to show that one important body recognized its weakness and made provision at least for their training in a trade as well as for the custody of their goods.[9] The operation of the Court, though still authorized by law, has fallen into desuetude.[10] The French and Italian systems of law, on the other hand, being based upon the old Roman law, recognized that by the father's death the family is deprived of the patria potestas. In order to provide, so far as possible, for this loss there was developed in the course of centuries the family council,[11] whose constitution and authority were embodied in the French Civil Code and thence have been adopted with almost identical features in nearly all the continental systems of Europe. The desire to continue the same home for the children and to avoid the loosening of the family ties, is also a characteristic of the provisions of the continental codes of law relating to guardianship. In order to appreciate more fully the position of the family council in the foreign systems of law it may be well to state its constitution. The family council[12] consists, with the justice of the peace, of six relatives, half paternal and half maternal, residing in the parish, or within twelve miles of the domicile of the minor, and when there is not a sufficient number of relations, the justice of the peace then appoints persons who had been intimate with the father or mother of the child.[13] According to the rule of the old Roman law, women, with the exception of the mother and grandmother,

5. See the provisions of Article 24 of the League of Nations Covenant quoted in (1919), 29 Yale Law Journal, 209, note.
6. Reinsch, Public International Unions, their Work and Organization (2nd ed., 1916).
7. Reinsch, op. cit., 185.
8. 43 Reports of A. B. A., (1918), 303, 306.
9. Borun, Privilegia, Londini, (3rd ed., 1723), 313-36.
10. Eversley, Domestic Relations, (3rd ed., 1906), 615.
11. Larousse, Grande Dictionnaire Universel. tit. Conseil de Famille; Dalloz, Jurisprudence générale (1897) tit. Minorité; Maleville, Analyse raisonnée de la discussion du Code Civil, No. 1, tit. ii.
12. Aird, Civil Laws of France, 53.
13. French Civil Code, Art. 409. The provisions that non-relations may be members of the family council exist also, for example, in Quebec, Spain and St. Lucia. See Burge, Commentaries on Colonial & Foreign Laws, (1907), 50, 52.

were excluded from the family council, but during the recent war this disability was removed in France.[14] Similarly it might be shown that in other subjects excepted by Professor Cammeo as being outside the work of unification there is much to be gained by a close study and adoption of laws of other countries. The Torrens system of land registration, for example, has been found to be applicable with modifications to such varying conditions as exist in the Philippine Islands, Egypt, India, and the Australian States.[15] Other examples might be given from his list of excepted subjects but there is no need to labor the point since it should be clear that nations like individuals can gain by the right use of the knowledge and experience of others.

The British Empire provides a peculiarly favorable sphere for the operations of the legislature in the direction of uniformity. Under the direction of the English Society of Comparative Legislation some years ago four volumes [16] were issued containing a review of the legislation for the years 1898 to 1907. In an introduction Sir John Macdonell observed:

> The history which the various statute books summarized in these volumes record seems to be everywhere similar. With much diversity of detail in this mass of legislation, it is surprisingly homogeneous; it has the same aims; it generally adopts the same means. Almost all the legislatures are making similar experiments, all making similar resolutions. The fact that for many parts of the Empire there is the same common law gives the legislation a similar character; much of it is intended to repair defects in that law or to adapt it to modern circumstances; for much of it there is a common background or substratum.

The general trend of the whole body of legislation, as Sir John Macdonell noted, which has been continued since he wrote, is the desire for amelioration of the conditions of life of the whole community; so that in this period of reconstruction when the main desire is to secure that the sacrifices which have been made shall bear fruit in the advancement of the national life, a survey of the legislation of the Empire has an especial value. In spite of the difficulties under which the work of the Society was carried on during hostilities the publication of the annual volume of the review of legislation has been continued without a break and announcement has been made of an intention to expand it.[17] The Society has undertaken to develop its activities by co-operating with government departments and private organizations in collecting or supplying information much in the same way as is done by legislative reference bureaux.

The establishment in Canada of a body of Commissioners on Uniform Laws similar to the National Conference of Commissioners on Uniform State Laws, suggests the nucleus of an imperial body working in co-operation with the Imperial Conference. The primary cause leading to their formation has been the diversity of legislation with regard to commercial law which raises obstacles to closer business relationship. That operates to a greater or less degree throughout the Empire, so that a standing committee either of the Imperial Conference or some unofficial body dealing with uniformity of legislation is an immediate *desideratum*. Such a body would naturally influence and be influenced by the United States Commissioners so that the bond supplied by the common law would be strengthened and renewed by uniform statutory legislation in important subjects, such as is already in force in relation to bills of exchange. Ultimately the balance of convenience will no doubt lead to a general adoption of the Anglo-American system, at all events in commercial matters, rather than the continuance of the divergencies now existing in continental law. The movement towards unity to be strong and healthy should proceed from below. Any attempt to impose it from above is almost useless. The practical value of disseminating widely the study of comparative legislation is, therefore, obvious, since only by that means can the general body of public opinion realize the obstacles to closer intercourse and appreciate the advantages to be derived from the adoption or avoidance of legislation in operation in other countries.

It may be concluded, therefore, that comparative jurisprudence has a double value at the present time. On the one hand it has a contribution to make to the effectiveness of the new international relations which are being established as a result of the war. The Secretariat of the League of Nations will need to be supported by strong national centers devoted to the collection and dissemination of information relating to the laws of other countries. France and England have for many years had their Societies of Comparative Legislation. The Comparative Law Bureau of the American Bar Association fulfills a corresponding function in the United States, though its work is somewhat dwarfed by official bodies and voluntary organizations concerned with the study of special subjects. The organization specially devoted to the study of comparative jurisprudence, whatever may be its precise constitution, has on the other hand a domestic as well as an international work. It can inform the Government, societies and individuals as to the laws and their working in other countries, so that legislation, instead of being somewhat haphazard and piecemeal as it often is now, may be based upon the experience of other countries. While it cannot become a body to advocate special reforms it may readily stimulate interest in neglected subjects and direct attention to the treatment of matters which, if ignored, may readily develop into serious problems. It may be claimed without hesitation that the study of comparative jurisprudence is the most important field of legislative research at the present day.

*(From The Canadian Law Times, Vol. XL, November, 1920. No. 11.*

14. Law of March 20, 1917.

15. Cf. Innes, Law and Registration of Title in the Philippine Ids., (1919), 28, Jour. Comp. Leg., 266. Also see Niblack, Pivotal Points in the Torrens System (1915), 24 Yale Law Jour., 274; Hogg, Registration of Title to Land. (1918), ibid, 51; Hogg, Conveyances of Registered Land, (1920), 29 Ibid, 401.

16. The Legislation of the Empire. being a Survey of the Legislative Enactments of the British Dominions from 1898 to 1907, with a Preface by the Rt. Hon. the Earl of Rosebery.

17. Although the English Society has many good friends and supporters in the United States it is still perhaps not so widely known as it might be, and the developed scope both of the Journal and the review of legislation may reasonably be expected to lead to further additions to the membership. The address of the Society is 1, Elm Court, E. C. 4.

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## SIGNED ARTICLES

As one object of the JOURNAL issued by the American Bar Association is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

# CHINA: A SYMPOSIUM

## Discussion of Some of the Fundamental Problems of Eastern Republic by an Englishman, a Chinese and a Chinese-American

*Note: China is now very much in the public eye but a large part of what circulates as information is inaccurate. Our readers have here the opportunity of learning the real conditions from men on the ground who have made special studies of their respective themes. Mr. Woodhead is the editor of the Peking & Tientsin Times, the leading foreign daily newspaper of North China. Mr. Ling is President of the Alumni Association of Christian Colleges. And Dr. Mei, who was born in San Francisco and has a degree from Columbia University, is a member of the American Bar practicing in Shanghai.—Ed.*

## EXTRATERRITORIALITY

By H. G. W. Woodhead

IN spite of the labours of the Law Codification Commission, and the eloquent expositions of the nature and extent of China's judicial reforms by returned students, there is little evidence to show that the administration of justice in China today is any better than it was under the Manchus. Some of the more barbarous punishments may have been abolished, a few model prisons may have been established, and, on paper, an elaborate and excellent judicial system may appear to have been created. But any foreigner, lawyer or layman, whose business brings him into touch with Chinese Courts, would view with dismay the suggestion that foreigners should become amenable to the Chinese judiciary in criminal and civil cases.

For one thing, the Military stand above the law. The back-garden incident in Tientsin, when Lu Chien-chang was shot offhand by General Hsu Shucheng, is but one example of the risks to which foreigners would be exposed by the immediate withdrawal of the protection of their own authorities. China does not possess a competent and honest judiciary; she does not yet possess codes of law acceptable to civilized peoples. Even if back-garden executions were not to become the order of the day on the abolition of extraterritoriality the Foreign Legations and Consulates would have to work overtime endeavouring to remedy injustices perpetrated upon, or grievances suffered by, their nationals. The immediate abolition of extraterritoriality, or its abolition, unconditionally, at any future date, is unthinkable.

Three of the Treaty Powers, however—Britain, America and Japan—are pledged to relinquish their extraterritorial rights when satisfied "that the state of the Chinese laws, the arrangement for their administration, and other considerations" warrant their so doing, and also "to give every assistance to such reform." The practical question to be considered is how such assistance can best be given, with the object of stimulating China to "reform her judicial system and to bring it into accord with that of Western nations."

Even foreigners who are most bitterly opposed to the abolition of extraterritoriality will admit that the present system of administering justice, as between Chinese and foreigners, leaves much to be desired. The Shanghai Mixed Court, probably the biggest Court in the world, is presided over largely by amateur Assessors, some of whom undoubtedly regard it as their duty, not merely to "watch the proceedings in the interests of Justice," in cases in which the interests of their nationals are involved, but to bully the Chinese Magistrate into decisions in favour of their nationals which are contrary to law and justice. There is no machinery for an impartial rehearing of cases in which either party desires to appeal. There is no recognized code of laws or procedure to guide the Court in its decisions, with the result that it is not infrequent for foreign Counsel to cite the laws of their own country as applicable to a Chinese defendant. The Mixed Court in Shanghai is as urgently in need of drastic reform as any purely Chinese tribunal.

In the reconstruction of China we may exclude the immediate abolition of extraterritoriality as impracticable, but we must not be content with the rejection of China's demand without an undertaking on the part of the Foreign Powers to do whatever is possible to assist China towards her judicial emancipation. A layman must naturally feel considerable diffidence in offering suggestions regarding a complicated legal problem. He can only hope, at the most, to direct thought into new channels, leaving the details of the scheme to be worked out by legal minds. The problem as it presents itself to us is this: a variety of Foreign Tribunals—some, such as the British Supreme Court, and the American Court for China, presided over by experienced Judges; others, far more numerous—presided over by Consular officials—endeavour to administer the laws of their respective nations, as modified to suit local needs, in the Treaty Ports. The result cannot be considered satisfactory. Cases are within our recollection in which three criminals of different nationalities, associates in the same crime, had to be tried by three different Courts, the law, and the penalty inflicted, being different in each case. And one can imagine the complexity of a civil action in which (say) a Japanese sued a British subject in connection with property in American hands.

If Chinese Tribunals cannot be trusted to administer justice to foreigners, is not the logical alternative that all foreign Tribunals in this country should administer *the same law*—Chinese law? Providing acceptable Civil and Criminal Codes are forthcoming, that, it seems to us, would be the first step in the solution of the problem of extraterritorial jurisdiction. Not only would it simplify legal proceedings in which foreigners are concerned, in this country; it would found precedents and furnish a model for the Chinese Courts of the future. It would abolish the complexi-

ties arising from the conflict of laws of the various Treaty Powers. If an American instituted civil proceedings against a Briton, in which Japanese interests were involved, the whole case would be threshed out before a Bench composed of a British, an American and a Japanese Judge, *administering the laws of China.* Such absurdities as the case being tried first in the British Court, a counterclaim being heard in the American Court, and finally, proceedings being taken in the Japanese Court to give effect to the judgments of the British and American Tribunals, would no longer be possible. And where a Chinese was the Plaintiff, or an interested party, the Chinese Judiciary would have its representative upon the Bench. The adoption of such a scheme would require, as the first step, the promulgation of Codes of Laws acceptable to foreign legal experts.

This, however, would be but the first step, and only one phase of the reform of China's judicial system. The Foreign Judges, administering Chinese law, would be available for the hearing of Appeals from the Mixed Court, being associated in such hearings with Chinese colleagues of equivalent rank. And after the system had been tested in the Foreign and Chinese Courts at Shanghai, the Chinese Judges could gradually be assigned wider responsibilities. They could sit, at first, merely as spectators, on the Bench of each Foreign Court. After a period of probation they could be granted a voice in the proceeding at such Courts, the Foreign Judge or Judges for some time having the deciding voice in the Court's decision, but in course of time yielding equal authority to the Chinese Judge, and in the final phase of reconstruction only acting in an advisory capacity. The Foreign Judge, in other words, would then assume the role accorded by Treaty to the Mixed Court Assessor namely, "merely attending to watch the proceedings in the interests of Justice," with "power to protest against them in detail" when dissatisfied.

The adoption of this plan would result in the abolition of Extraterritoriality being divided into three phases: 1. Chinese laws (approved by the Treaty Powers) administered in Foreign cases by Foreign Judges, with Chinese Judges as spectators; 2. Foreign and Chinese Judges jointly trying such cases with equal powers, in accordance with Chinese law; 3. Chinese Judges trying such cases, with Foreign Judges acting as Assessors. The transition from Extraterritoriality to China's complete judicial emancipation would thus be accomplished by stages, during which a competent Judiciary could be trained, and sound precedents established. The disappearance from the Bench of the Foreign Judge, when it came, would not then involve a complete break in the Judicial administration, but merely the continuation of a system established, and built up, with foreign aid. The Chinese legal codes would have been tested, and remedied where found wanting. The Foreigner would have become accustomed to submitting to Chinese law and view the abolition of Extraterritoriality without alarm. Senior posts in the Chinese Judiciary would be held by men who had been through, and creditably acquitted themselves in, the Model Courts. For though we have spoken only of Shanghai, the reconstruction of the Chinese judicial system would obviously involve an extension of the system inaugurated there to other centres where there were large foreign communities.

And concurrently with the reform of the Judicial system, foreign aid would be enlisted in the reform of the Chinese prison system. A number of model prisons have already been established in China, but very much more has to be done to bring the Chinese penal system into line with Western notions of humanity and penology.

# SUICIDAL FACTORS AT WORK IN CHINA

By E. S. LING

CHINA has, during the past eight years, been in name only a Republic—"a government of the people, by the people and for the people"—while, in reality, oligarchy — the Anfuite — rules supreme in this country. Our country has, after the overthrow of the Manchu dynasty, launched into no better harbour: she comes out of the Manchu pan but into the Tuchun's fire! With the external aggression and the external strife, she has been brought, to use the old proverb, "to the verge of the precipice by a blind man on a blind horse at midnight."

Our country is, today, in danger, not so much from without as from within. She has been "knocking her own head with a cane." We need not blame others for being highhanded, or for imposing humiliation upon us; for it is we who are either apathetic or inviting the hungry wolves into our house. Thus we have been warned by our great sage, Mencius, that "a man must first despise himself, and then others will despise him. A family must first destroy itself, and then others will destroy it. A kingdom must first smite itself, and then others will smite it." But, what are those practices that have been smiting this country? They are our suicidal factors—surely fatal—to which I wish to call attention, and against which, every patriot is, in response to duty, to fight. Of these destructive forces that are undermining this nation, the most important may be grouped under three headings: Political, Commercial, and Individual.

## I.—Political

1. — Misgovernment. For centuries we Chinese people have not enjoyed the rights of good government, consequently many strong ones have turned to robbery, the weak died of hunger or famine; while large crowds have poured into the South Islands, where they, under foreign flags, have turned the jungles into a paradise. They went as coolies from China: they return—millionaires. Feeling against misgovernment has grown rapidly and culminated in the overthrow of the Manchu government. But, alas! under the Republic our people have fared no better. By civil strife between the North and the South many a home has been looted, many a farm devastated, and many people murdered. The rich have fled to the "Cities of Refuge" where they built the modern Canaan and treasured their gold and not a few sought the protection of foreign colours. "As the otter aids the deep waters driving the fish into them, and the hawk aids the thickets, driving the little birds to them," so misgovernment has driven the people with their assets to foreign lands. Can we expect to have a good government, "the first great office of which,"

to use the words of Dr. Hopkins, "is the prompt, efficient, impartial protection of rights and the redress of wrongs," if we "put our hands in the sleeves and look on?"

2.—Corruption. As one of the fatal suicidal factors, corruption has grasped a stronghold in the minds of the officials, and will, eventually, bring this nation to bankruptcy, unless we, both the alumni and alumnae, can create a strong and dynamic public sentiment to blast this evil, before it is too late! As hell is never full, so the official mind is never satisfied with the loot of public funds. In the name of paying the troops, loan after loan has been made, which seems "drinking poison to quench the thirst." They are but drops of water in the greedy ocean of officialdom.

It has been reported that there are twenty officials, each of whom has deposited $10,000,000 in the foreign banks of Hongkong, besides many others in this country whose fortunes range from one to five millions! If the reports are true, where did they get their fortunes, if not by clandestine robbery from the national revenues? It is sad to depict that even some of these "enlightened" in foreign countries have been contaminated with this crime. Will education alone save the country from being looted? The more educated, sometimes, the greater the plunderer. If we do not attempt to remove it, some external power will, to our eternal disgrace, step in and take a hand in our government.

3.—Muzzling of Public Opinion. Of all the structures of the ship of state, the keel of public opinion is the most important, as it supports the whole frame. In a democratic government, it is indispensable, as it stands for the back-bone, upon which the government relies for support. Our country, though a Republic, has not enjoyed the rights of freedom of speech. Many a newspaper office, when impeaching the wrongs of the so-called "big men," has been closed down and the editor arrested. Meetings for the welfare and the protection of the country have not infrequently been prohibited and speeches on the salvation of our mother-country muzzled at the instance of others. Will Truth be crushed forever? What are we to do, fellow-alumni?

4.—Likin Tax. As a by-product of corruption, Likin has handcuffed our merchants, killed our native trade but enriched the officials. It is a means to an end. Many of those who were before in Lucrative Likin offices, have now retired and enjoy a comfortable life with their concubines! We are today encouraging the sale of national goods, but how can it be extended into the interior, when Likin offices are netted over the country? It is said that a native-made toothbrush is sold at Canton for five cents, but placed on sale in Kalgan, the price is 30 cents, the other 25 cents being mostly Likin. Can we help to remove this millstone, which has been on the neck of our native trade and industries for so long?

5.—Insecurity of Office. The insecurity of office in the government is another cause of corruption and misgovernment. At least 50 per cent, if not 75, of those in office today hold to the principle of "making hay" on public funds, "while the sun shines," while others who are not shrewd enough will remain satisfied with carrying out the routine of "being a monk for one day, he sounds the bell for the same length of time." When a high official is removed through lack of influence, etc., his whole retinue of subordinates, be they qualified or otherwise, must go bag and baggage! How can we expect that the machinery of government will run efficiently, when we have new and inexperienced hands all the time? Will they faithfully serve the country when they know that their office will last only as the mushroom?

### II.—Commercial

1.—Lethargy. Through lack of modern education, most of our merchants have hitherto remained lethargical. The articles that are today have exactly the same pattern as those manufactured a century ago, while our neighbours are turning out many new and attractive articles that find a quick market in China and the world. Very little pain, if any, has been taken to make a study of the commercial possibilities of this country, not to say, of the world. The quickest, simplest, and oldest method is to find where they can purchase, not how they can manufacture the goods. As a result, our country is getting poorer day by day, her hidden treasures in the earth being locked up and undisturbed.

2.—Mismanagement. That our people hesitate to invest their money in any commercial concern, many of them preferring to hoard up their gold in ornaments, in the earth or in foreign banks, is an evidence of the lack of confidence in any commercial enterprise run by Chinese. It is reported that most of the shares of a certain bank were formerly owned by Chinese.

A few years ago, a fine cement factory, well equipped and turning out the best cement in the Far East, was, on account of mismanagement, closed down and sold, the funds having been misappropriated. This forms one of the object lessons that "the tumbling of the cart ahead is a warning" to us. Shall we not relieve the situation by turning out men of integrity through the Nazarene School—the school of Christ?

### III.—Individual

1.—Graft. As mother to corruptions, graft has inflicted a severe blow upon this country. Through graft, the officials have sold the birth-right of our country for a bowl of pottage. It has forfeited the rights of sovereignty and killed the confidence of the public that the Customs, the Post-office and the Salt Revenue have, one by one, passed into foreign control. It has caused the suspicion in, and consequently the downfall of, many a business concern. The graft of officialdom finds its birth and stimulation in the corruption of the individual. Unless something is done to check it at an early date, it is feared that rights more momentous have to be sacrificed.

2.—Gambling. It is heart-rending to see that under the Republic gambling has full sway over the country, and the biggest gamblers are the officials, who throw away with ease lakhs of dollars in Pei Tai-ho, Peking, and in other cities. Under the Manchus, they were afraid of the impeachment by censors, but we have no censors today, and the public sentiment, which is to guard public interests, has not been strong enough to check this evil. Education has not advanced as quickly as the "poker," which has permeated with rapid strides into the nooks and corners of the interior, and taken the place of the game of "sparrow." The officials having taken the lead, the people follow with unabated eagerness. It is reported that last year five million sets of "poker" cards were sold in this country to the value of one million dollars, and last month 1,000,000 sets from Japan were sold in ten days. Who will help to uproot this social evil?

3.—Indulgences. For many years with national effects and foreign supports, the opium curse has at last almost been removed from this country, but fol-

lowing its footsteps is the so-called "sweet-smoke," which has ruined our youth not a little. According to Customs Reports, it has been on the increase every year, and if it continues in this way, ere long this nation will be suffocated. A few years ago, a movement was on foot to check this curse and had considerable success, but unfortunately was relaxed. Who has a better energy in the battle-field, the "smoker" or otherwise? In the place of opium many have attempted to introduce other opiates, so-called "drugs" and "tonics" and many in the North have become their victims. Are we going to tolerate these things?

Whisky, brandy, etc., that have been expelled from the United States have now gradually found a safe asylum in China. If America would—and with her efforts and means it has taken her many years to solve this problem,—take a strong step in making her country "dry," then certainly these liquids are our great enemies, sufficient to sap the life of this young nation. What will you do fellow-citizens?

4.—Obscene Reading. Of all the books that are on sale in the bookstores, the most welcome and widely sold are the novels, most of which are nothing more than obscene works. Some newspapers, void of principle, have helped to advertise these publications, consequently edition after edition have been printed and sold. Very few people attempted to create a public sentiment to prohibit their circulation. Realizing the monetary results derived from such sales, some unscrupulous newspapers have either devoted whole columns or even a supplement to introduce the tales or tell of the whereabouts of the prostitutes to their readers—a record I have never seen in foreign papers. To reach the climax, many indecent pictures, in the name of promoting art, have been painted and sold. Our youths "rush to them as ducks to water:" how can they afford to have their hearts and minds thus polluted? No wonder there are so many hotbeds of vice in this city.

### China's Only Salvation

I have portrayed only a rough sketch of the few mill-stones (any one of which is suicidal), which we have permitted to be placed on our shoulders. We cannot effect the salvation of our country, while the above suicidal factors are at work in our country. We have but two alternatives—to conquer or to be conquered—what is our decision tonight?

The salvation of China must commence at first from the individual spreading to the community, the government, and at last to the country as a whole. Let us start from the local government first. Are we willing to take any part in any activities locally that will help the constructive work of the community?

China's only salvation rests upon those who will give up their suicidal indulgences, sacrifice their selfish interests, and render service to the public. Our country has all the wealth, the natural assets, and the economic factors; but how many of the 400,000,000 have the above qualifications? The spirit of disinterestedness, of sacrifice, and of service is not an earthly product; it is a gift from God, the Supreme Intellect.

# SOME PRESSING PROBLEMS IN CHINA

By HUA-CHUEN MEI, J. D.*

WHAT are some of the fundamental problems in China that crowd for immediate solution? One is how to educate the masses of the people to an altogether new and sane attitude of mind towards the law, the courts and their officers, the lawyers; how to work into their second nature, as it were, a respect for the law, an appreciation that it is first an institution or a system founded for their benefit, and second that it is a science calculated to promote their and their posterity's lasting welfare; to make them realize that the law should be to them what it was to the Romans, namely, the science of the good and the just. And we must educate them, not necessarily through books or in schools, but through popular information and publicity so that their new appreciation and estimate of the law will find a sort of instinctive expression or reaction in their ordinary conduct, thought, and attitude as liberty-loving, self-respecting men and women, instead of a forced respect, or the cringing fear of a race of slaves.

It has been said that the Chinese are traditionally a peaceful and law-abiding people, having obeyed superior authority unquestionably for fifty centuries. Therefore any talk of a science of law was worse than useless; it could only become a nuisance. Let us see about this. By the books law is a living science, an elemental need to govern the relations between you and me so that we may live in order. No science, least of all a science of law, can rise from mere pacifist observation of the rules of non-resistance, or be developed by uncritical study of the classics and a blind acceptance of imperial edicts, sacred or otherwise. The science of law can grow only under the care of a body of experts who can ascertain and define its true principles the validity of which can be tested by living human experience. Tried by this standard, can the Chinese people be said to have ever had a science of law?

The answer to this is suggested by the almost instinctive fear the average Chinese, even the experienced business man, has of litigation and any appeal to the courts. This reluctance finds expression in the vernacular proverb: "Living, go not into the yamens: dying, enter not into hell." Could such an epigram ever receive general currency, were it not expressive of a common state of mind, and were there no modicum of truth to lend it popular credence? Such a state of mind long suffered will pass into a folk-way which will take long years to eradicate, and then possibly only by persistent education. But ideals will vastly help, and a sensible people like the Chinese can be depended on to strive for their realization, if ideals of the law, of the judiciary and of justice, are formulated for, and made intelligible to, them. For there never was any ideal of the law so far as the rank and file of the Chinese people were concerned; there was never a recognizable system or science of law known even to the highest administrative officials of the old empire, and the law as administered by its haphazardly chosen minions was not calculated to obtain the confidence of the people at large. The law was vague and vaguely interpreted and enforced. The criminal law was susceptible of elastic expansion to cover a multitude of analogous offences not mentioned

*Extracts from a Commencement Address at Comparative Law School of China, June 24, 1920.

or suspected in such statutes as may be said to have existed.

Such a condition of affairs may well have led and did lead to a wide distrust of agents of the law, a natural suspicion that the law was unjust, and a justifiable social ostracism of the frequently contemptible creatures who were the satellites of the magistrates, men who had some natural aptitude for legal scrivening, who were the yamen law clerks and who had some of the functions of the Roman juriconsults, but who held no honorable position in the community and were always objects of hate and contempt. The emperor, supposedly the fountain of law and justice, became like most oriental despots, too sacrosanct a figure to be seen or personally petitioned, and thus a situation inevitably came about in which you have the form and not the substance of a legal system. This situation has lasted through the ages and come down to us with accumulated sanction, and so in these modern days, China needs, among other pressing reforms, a new popular conception of law, made obviously just and simple, a new sanction for the source of law, and a new demonstration to the people of its real nature by upright, capable, and courageous ministers.

Another vitally needed change in popular psychology is from national self-distrust and self-depreciation, to national self-appreciation and national self-respect. By this is not meant the cultivation of a self-esteem that is next door neighbor to that conceit and self-sufficiency which have been the bane of China's national life for the last two centuries. Like nearly all Far Eastern countries, China pursued a policy of national aloofness, of splendid isolation, of the "closed door"—locked and barred! The folly of this exclusiveness once demonstrated, the door had perforce to be opened and kept open, but then in place of the poise that attends self-sufficiency, instead of the national self-conceit and sense of superiority, a new vice attacked the popular consciousness and permeated it with a feeling of despair and helplessness, —the vice of self-depreciation. Undoubtedly the political and military reverses of the last hundred years, together with the personal browbeating and aggression of foreign governments and individuals alike, have combined to produce this state of mind, but after all we must know our own character, our own capabilities, and our resources, and knowing them we need not be so ashamed as to count ourselves inferior to any race or nation on earth.

China from the time she first had intercourse with foreigners has been caricatured as a sleeping giant, utterly oblivious of his superabundant power and strength. But an unscrupulous propaganda sedulously promoted abroad and even in our midst has loudly and persistently decried the fast decay and decomposition of China until not only the ill-informed of Europe and America but even the Chinese people themselves are ready to believe these canards, ready to disown their heritage, to surrender their rights and to despise themselves. They ought to know better. It is amazing to see in this generation the wonderful glories of the real China, her literature, her art, her law, her inventions, all ignored or looked down upon, in favor of foreign substitutes. Chinese laws have until recently been neglected in the rush to imitate apishly a second-hand alien system, to copy it almost verbatim, not because it is superior or of proved worth, but just because it is foreign, and because it is fashionable to import. As Judge Lobingier has ably pointed out, China possesses law which can and should be improved on and is by no means to be thrown away.

In the same way foreign legal customs, not to say foreign jurists, foreign advisers, foreign lawyers are preferred to Chinese. To illustrate the influence of one foreign system of law, I need mention in passing just the personnel of the Taliyuan or the Supreme Court of China where, in a collegium of 43 judges 40 are returned students from Japan, one from America, one from Europe, and one trained in China, from which you may draw your own conclusions as to proportionate influences. With all this slavish following of things foreign, with the almost complete ignoring of native talent and material, can we rightfully say that China is truly making progress, or do we observe in it a perniciously degrading tendency that is retarding the growth of a real national consciousness and national patriotism? And it has taken the shock of a Shantung Settlement and a popular boycott of vast extent to rouse the Chinese people to a sense of the magnitude of their own folly and of the menace and insidious character of foreign propaganda, calculated to undermine the development of national spirit.

The popular mind must be taught to entertain a proper national self-regard, an appreciation of the national genius, and to kill off that devastating vice of self-discount and self-distrust. They must fight it by their own faith in the capacity of indigenous talent: battle with it until their own integrity and competence will blazen out so that he who runs can see, and the day will surely dawn when this snobbish weakness for foreign things will dissipate, and they will come into their own.

I wish to point out another mental trait in the national character that must be dealt with, and that is its indecisiveness. Much praise has been heard from well-meaning and indulgent foreign friends that the Chinese race has a "genius for compromise, a sweet reasonableness" of disposition. Now compromises and reasonableness are excellent qualities to display in lovers' quarrels, but I, for one, must insist that when men, in the spirit of crusaders, do battle with the forces of evil, with the national vices and national despoilers, they cannot indulge in compromising parleys. They must fight to win or perish in the venture. I doubt the worth of any doctrine that approves compromise with evil. You cannot be reasonable with the devil. Just so, you cannot compromise with the flock of vultures in human form that are tearing at the vitals of the nation and sucking the life-blood of its people, nor can you be reasonable with the men who trample under foot the inalienable rights we seek to win in a Constitution, and in national laws. If there is one mental trait, now needed to make for national stamina, for national stability, for national success, it is that of decisiveness. Let us as a people not waver any more, nor drift, nor prattle, nor compromise, but stand for truth, for things substantial and constructive. Let us fight for and win with national salvation. Let us not tolerate the traitors nor suffer them still to live and thrive in honor, power, and wealth. Let us decide to be clear-cut, honest, and decisive in our national thought and act.

And akin to this quality of indecisiveness is the habit of inertia that characterizes official behavior. One need not go far to see lethargy, sloth, and weary-waiting written over governmental portals. One encounters it whenever contact is had with a functionary

important enough to style himself an official. From the bottom rung of the mandarin ladder to the topmost post nobody is gripped by the spirit of Grover Cleveland when he said that "public office is a public trust." No one dares or cares to accept responsibility for any step that moves an inch outside of the age-old ruts; responsibility is always shifted. Inertia, immobility, placidity seem to be the proud mottoes; initiative, enthusiasm, and zeal are words not found in the mandarin lexicon. Try to introduce a new idea, institute a new system,—even a suggested improvement in routine is either frowned down or politely listened to and then pigeon-holed and left to rot with the dead-and-gone schemes of the past. And what goes on or fails to go on in the nation's capital finds reflexes—sets the example and the pace—in the provinces with but varying shades of local color.

When we shall have cultivated a new conception of the living law, have seen it ennobled by respect and intelligent obedience, when we shall have possessed for ourselves a proper self-appreciation, and obtained a decisive mode of national thought and action, we shall see the law in a new dignity. No longer shall we be forced to listen to the contemptuous paradox that China is a Republic without republicans, that she has several constitutions without constitutionalists. Then we shall have and maintain an organic law that shall symbolize the sovereign power of this great people, that shall embody the might, the genius, and the justice of our ancient institutions, just as the American Constitution has become the sacred charter of political aspirations, and the symbol of the majestic power of America. And in place of the classical ideals of government that but promoted personalism and perpetuated autocracy, the Chinese people will have a worthy instrument to obey as their fundamental law, and not as the promulgation of this or that autocrat. Then they shall no longer be flouted as incapable of self-government because of their inability to recognize law as law, but only as the mandate or the will of a Yuan Shih-k'ai or a Manchu monarch. And it will be our proud duty to inculcate in the mass of our people a sublimer loyalty, that loyalty to the State and not to the individual which even Yuan Shih-k'ai declared to be the original meaning of allegiance. Right and justice must triumph, as they have ever triumphed from the beginning of time.

I shall have time only to mention a few of these practical obstacles that will face the minds of courageous young men all over the country who are at this time eager to enter the lists to fight for the nation's good, keenly jealous of its honor, and determined to preserve its independent life. Undoubtedly the first problem to suggest itself is political stabilization. We shall have to address ourselves with all seriousness to make the government stable, not only truly republican, smooth and safe in its machinery, but honest in administration also. That means hard work but the prize is worthy of the labor,—the prize of laying sure foundations, legal foundations so that the State, as written in the Massachusetts Constitution, shall possess "a government of law, and not of men." The best of Constitutions is in its very nature but a mere counsel of perfection. What is needed will be devoted men of high character and impeccable worth who as officers under the Constitution shall translate the fundamental law into a living organism, instead of regarding it as a dead statute book. We have been told that the Chinese are unfit for representative government; that the novelty of parliament has prevented them during the Republican régime from doing its work. It is plain to all that what has prevented Parliament from functioning has been greed, ambition, and militarism. Eradicate these evils, which will take considerable time and toil, and we shall not fear for a real experiment in representative government in China. With the gaining of experience and political knowledge, Chinese politics will revolve less and less around personalities, and more and more around issues.

A problem that will especially engage the attention of law students is that of the independent judiciary, and the selection of qualified men to fill the benches. The separation of the executive from judicial functions having been recognized as a necessity, it remains to put it into operation. The problem must be firmly and persistently urged until it is solved correctly, and a permanent, irrevocable divorce of the unholy union of administrative and judicial offices secured. Until that is accomplished all talk of justice and judicial reform is either buncombe or mere advertising. When judicial independence is an assured reality we can attract to judicial offices men of acknowledged ability, of unquestioned character and learning who, sitting on the bench, will neither knuckle, nor subordinate themselves, to the executive or legislative branches of the government. Then indeed we can safely speak of successful judicial reform.

I come now to a brief consideration of that delicate problem, the abolition of extraterritoriality, or, more strictly speaking, its relinquishment. One may yield to none in sympathy with the patriots who are seeking the ending of this alien system to restore complete sovereignty to China and yet may not approve, at this time, of this agitation, without shutting one's eyes to hard facts. While no one claims that extraterritoriality has benefited China,[1] yet its withdrawal now might be a disservice rather than an advantage. Much has been said of the economic advantages that would ensue to foreigners if they consented to relinquish their extraterritorial rights. But there remains one indispensable condition fixed by the treaties, which ought to be performed but has not yet been performed. And those who cry loudest for abolition have not advanced a single plausible argument substantiated by facts to justify immediate ending of the system. An official in the Ministry of Foreign Affairs calmly asserts that very able judges have been appointed to various courts and that therefore the judicial reform is an accomplished fact, ergo, the time for abolition of extraterritoriality is now. Another writer pleads in all gravity that experience of Chinese courts as now constituted will convince foreigners that they meet Western standards. Now with all due respect to these authorities, one may say that a few months at the bar would disillusion them. What they have done is taking proposal for achievement. A court as close in proximity to model foreign tribunals as the Shanghai Shenpanting shows the unenviable *record of 95% of all its civil cases, unadjudicated, and only 5% of all rendered judgments, executed.*[2]

We must not forget that governments, like individuals, are human, and it is not human nature to do

1. Dr. Mei overlooks the object lesson in judicial administration afforded by the foreign courts.—ED.

2. It is estimated that the Peking judiciary authorities have on hand one thousand outstanding cases. With the establishment of a temporary extra court which has been functioning for three months the total has been decreased to 700. It is proposed to retain this extra court for another two months to expedite the settlement of the numerous outstanding cases, Jan. 1, 1921.—Ed.

those things in which there is no direct or tangible incentive. Surely the restoration of a fundamental element of sovereignty like the unconditional assertion of jurisdiction over all persons, irrespective of nationality, found within the territorial bounds, would be a supreme inducement to government to put forth its utmost efforts to fulfil the condition precedent to such restoration. But the situation remains *in statu quo*. What warrant then is there for the hope that, once the condition is voluntarily removed without regard to its performance by China, sincere efforts will be made to bring China's judiciary up to modern standards? More justifiable hope can, however, be placed on an awakened and potent public opinion to compel this reform urgent for both Chinese and foreigners. Once the Chinese nation rises to meet this vital need of a modern judicial system, they will by this act convince both foreigners and themselves that the time is ripe to abolish extraterritoriality! The actuality will not need to be advertised, for the alien system will then have outlived its usefulness, and the advantage of removing it will persuade foreigners more quickly than arguments.

Of much the same nature as the extraterritorial problem is the question of the restitution to Chinese control of the Shanghai Mixed Court civil jurisdiction in purely Chinese litigation. Too often, however, is this question linked up with dickering. The matter should be decided by those whom the Court chiefly affects. That decision cannot long be delayed when China has put her political house in order and gotten her own judicial machinery running in line with that of enlightened nations. But while the Mixed Court, as at present conducted, is with us, it at least affords good practice for Chinese lawyers with and against competent foreign practitioners. For the Mixed Court is the only place where they can work on a reasonably equal footing, since Chinese lawyers are denied access to practise in the foreign courts.

The burden of this address is this, that however chaotic the conditions, however discouraging the outlook, or how impossibly intricate the problems seem or whatever sinister personality may for the moment darken the political horizon, we should not hesitate to go into public life. Go into it firmly loyal to the highest ideals, and resolved to fight heroically for them so that the China of tomorrow may be a better one than the China of today. For only as young men, filled with the spirit of altruism and the great adventure of battling for justice, go unflinchingly into the muck of things as they are, go into it, mix with it to purify and to leaven it, is there any real hope for a rejuvenated China.

"He who has not come to that stage of quiet and eternal frenzy in which the beauty of holiness and the holiness of beauty mean one thing, burn as one fire, shine as one light within him—he is not yet the great artist." C. S. L.

### A Self-Governing Bar

The bar in the aggregate is unique in respect to its close relation to the administration of justice and its exclusive possession of knowledge in respect thereto. Yet the bar is without any practical organization through which to exercise its power, and as a result many matters which pertain chiefly to its province have passed to other hands. Admission to the bar is left to a few official examiners appointed under a law passed by laymen. Exclusion from the bar is delegated to a few over-worked judges. The selection of judges, a subject on which few outside the bar have any competency whatever, is in the hands of laymen guided by politicians. The establishment of the rules of procedure under which judicial business is transacted is vested in legislatures which give it some cursory attention after matters of political importance have been attended to. All this has come to pass because of the want of an organization to mobilize the profession. "The lawyer has been scolded and exhorted so long that he would feel neglected if his critics should cease. But nobody has ever suggested the practical steps to be taken to enable him to work out his salvation. The time has come to stop moralizing and consider a definite plan for integrating the bar so it can realize its highest ideals." (Journal of American Society of Judicature, December, 1918.) The membership of the existing bar associations is a small minority of the bar, and their powers are confined largely to electing officers, holding dinners, and passing resolutions. That they have been able to accomplish anything toward reform in procedure is due to the heroic efforts of a comparatively few men. Suppose, however, there should be created bar associations in which every lawyer was ipso facto a member, having the control of admission to and expulsion from the bar, and of nominating all candidates for judicial office. To such an organization could likewise be committed the power to enact, by proper formulating committees and a referendum, all rules of judicial procedure. These are extensive powers, it is true, and liable to abuse, but they must be exercised by some one, and it is submitted that not one of them is today in hands so competent or so trustworthy as those of the bar. It may be noted that in Minnesota the district court judges have recently appointed a permanent committee to act on proposed changes in court rules and procedure, and to consider legislation. This is a step in the right direction, albeit a short one. To be really effective the committee should be representative of a fully organized bar, and that bar should have much power with respect to the regulation of procedure which is now committed to the legislature.—Law Notes, Vol. XXIII, No. 7.

### Changes in Legal Science

Comparing twentieth-century science of law in America with the legal science of the last quarter of the nineteenth century, the most significant changes are, the definite break with the historical method; the study of methods of judicial thinking and understanding of the scope and nature of legal logic; recognition of the relation between the law-finding element in judicial decision and the policies that must govern law-making; conscious facing of the problem of harmonizing or compromising conflicting or overlapping interests; the pulling apart and setting off of the several conceptions involved and concealed in the protean term "a right"; faith in the efficacy of effort to improve the law and make it more effective for its purposes; a functional point of view in contrast with the purely anatomical or morphological standpoint of the last century; giving up of the idea of jurisprudence as a self-sufficient science, and unification of the methods each of which formerly claimed exclusive possession of the whole field.—Harvard Law Review (March, 1921).

# LATIN-AMERICAN LEGISLATION

Beginning of Important Reforms in Brazil—Bolivian Food Control and Other Laws—Chile—Colombia in 1920—Annulling Tinoco Acts in Costa Rica—Cuban Moratorium—Ecuador—Honduras—Nicaragua—Panama—Salvador's Petroleum Deposit Act—Military Government Orders in Santo Domingo—Venezuela's Aviation Law, Etc.

## I. Brazil

FEDERAL legislation in the United States of Brazil during the past year has been fairly active and some laws of importance have been enacted, which will be reviewed here. But the larger part of the legislative program, which at present occupies the attention of the Federal Congress, is yet in course of legislative gestation, and has not reached the stage of Executive promulgation as laws. This program embraces "a series of reforms which will profoundly modify the most important laws of the country," as stated in a Senate Report dated in December last. Among other matters of capital importance, there are now pending consideration in the Congress such large measures as the series of new codifications of great branches of the law, as the Penal Code, the Military Penal Code, the Commercial Code, the Administrative Code, the Forestry Code, the Code of Waters, the Code of Public Accounting, besides laws of judicial organization, and of public instruction in all its grades, primary, secondary and superior, and most important, a new and thorough Customs Tariff Law. The mere enumeration of so comprehensive a program of legislative activity carries a high testimonial to the fecund spirit of legal and civil progress in that great Republic. The principal legislation of 1920 will be briefly noticed.

*Consular Invoices.*—Decree No. 14,039, of January 29, 1920 (Diario Official, Jan. 31, 1920). This is an intelligent and important series of Regulations, covering in several chapters the whole subject under the following heads: I. Of Consular Invoices; II. The Legalization of Invoices; III. Of Fees; IV. Models of Consular Invoices; V. Duties of Consuls; VI. Customs Houses and Revenue Offices; VII. Obligations and Duties of the Bureau of Commercial Statistics; VIII. Nomenclature of Merchandise; IX. Fines; X. General Provisions.

*Reorganization of Department of Foreign Relations.*—Decree No. 14,056, of February 11 (D. O. Feb. 19, 1920). The personnel of the several divisions of this Department of State, the duties of the same, and all similar matters are here fully prescribed.

*Regulations of Brazilian Consular Corps.*—Decree No. 14,058, of February 11, 1920 (D. O. Feb. 19, 1920). In Brazil and many other enlightened countries, other than our United States, consular office is a "career" or life-time profession, and not a haphazard political reward. Without going into detail of the Regulations, it is very instructive to note the requirements of candidates for appointment, while wondering how sundry North American aspirants would compete: (a) Portuguese, French and English languages, spoken and written correctly; and, at the candidate's option, Italian or German; (b) General and Brazilian geography, including Commercial Geography; (c) Arithmetic; (d) General and Brazilian History; (e) Notions of International Public and Private Law, and of Brazilian Constitutional Law, especially a complete knowledge of the Federal Constitution; (f) Commercial Law, especially Maritime, in its relations with the diplomatic and consular careers, and succinct notions of Political Economy; (g) Brazilian Legislation in regard to the consular career.

*Chemical Fertilizers and Commerce Therein.*—Decree No. 14,177, of May 19, 1920 (D. O. June 15, 1920). Prescribes the qualities of fertilizers, the manner of certifying the same, regulation of trade in these matters, and penalties.

*Income Tax Regulations.*—Decree No. 14,263, of July 15, 1920 (D. O. July 23, 1920). These regulations follow the Law No. 3979 of December 31, 1919, prescribe the following principal sources of income tax and the rate imposed:

(a) Upon dividends and all other proceeds from shares of stock, including amounts withdrawn from reserve or other funds, to be, upon any account, delivered to stockholders, etc., 5%;

(b) Upon the interest of obligations and debentures of companies or anonymous societies or societies em commandita por occões, 5%;

(c) Upon the net profits of stock companies with limited liability, domestic or foreign, 5%;

(d) Upon the net profits of banking houses and pawn shops, 5%;

(e) Upon fees paid to directors and presidents of companies, etc., 2½%;

(f) Upon interest of credits or loans secured by mortgage, 5%;

(g) Upon premiums of land and maritime insurance, 2%;

(h) Upon premiums of life insurance, pensions, etc., .005%;

(i) Upon fortuitous gains: winning at drawings, distributions by merchandise clubs, etc., 10%;

(j) Upon the net profits of the fabril industry, not comprised within letters a, b, and c, 3%.

Detailed provisions for the assessment and collection of all these taxes, and for all procedure related to the system, are contained in the Regulations.

*Stamp Tax Regulations.*—Decree No. 14,339, of Sept. 1, 1920 (D. O. Sept. 4, 1920). The Imposto do Sello, or Stamp Tax Law, is a very pervading system of internal revenue taxation, by means of adhesive stamps or stamped paper; "it is proportional, and fixed; it is imposed upon the contracts and acts, set forth in great number in annexed schedules, and its collection is effected by means of stamps or by receipts of the collecting offices." Too numerous to be recited are the subjects of this tax, which applies, generally, to nearly every kind of contract, evidence of debt, and commercial or civil act.

*Foreign Legation Building.*—Law No. 4171, of October 30, 1920 (D. O. No. 4, 1920), authorizes the Executive to acquire buildings for the Brazilian Em-

bassies and Legations in foreign countries, through the use of credits, in each fiscal year, up to 1.000$000, or one thousand contos de réis. This seems to be a more commendable course than the war-debt credits proposed in the late U. S. Congress. The plan of acquiring and owning the homes of the diplomatic representatives abroad is of great concern and urgent recommendation.

*Code of Military Justice.*—Decree 14,450, of October 30, 1920 (D. O. Nov. 30, 1920). This Code, of 360 Articles, reorganizes the administration of military justice along the lines of similar systems in most of the countries, through a permanent system of military tribunals, with permanent judges and officers, in marked contrast with the ephemeral courts-martial known in the United States. In view of the recent agitation in this country for the reform of courts-martial, and the recent improvements made in the Articles of War, and the further radical improvements for which there is yet room and need, the more salient features of this Brazilian system, which is common, I repeat, to most other countries, will be indicated:

Art. 1.—The territory of the Republic, for the administration of military justice in time of peace, is divided into twelve departments. Art. 2.—Military justice is exercised: (a) By Auditors and Councils of Military Justice, in the respective departments; (b) By the Supreme Military Tribunal, for the whole country. Art. 3.—Each department shall have one Auditor (except in the Capital department, which has seven, four with jurisdiction in the Army and three over the Navy). Art. 5.—The military judicial authorities shall be assisted: By the Public Ministry, composed of a Procurator General and promotors; by clerks, and by officials of justice. Art. 9.—The Auditors shall be appointed by the President of the Republic, upon the proposal of the Supreme Military Tribunal, from among citizens holding diplomas in law issued by official institutions, or persons so qualifying themselves upon competitive examination. Art. 10.—The Auditors shall not hold military rank; they shall be appointed for life, and shall not be removable except in certain exigencies.

Art. 14.—The Council of Military Justice is composed of the Auditor and of four military judges, of rank equal or superior to the accused; it shall sit under the presidency of the officer of highest rank, or as among those of equal rank, of older commission. Art. 15.—The military judges shall be drawn by lot from among the officers of Army or Navy in active service in the department, every six months, by a plan set out in the Article; the Council so formed shall function for six months.

Art. 25.—The Supreme Military Tribunal shall be composed of nine judges, designated ministers, appointed for life, by the President of the Republic; three are to be chosen from the general officers of the Army, two from those of the Navy, and four shall be civilians, chosen from among the Auditors, or lawyers distinguished for knowledge of military law. Art. 27.—The Secretary of the Tribunal shall be a licensed lawyer. Art. 29.—The Promotors of military justice shall be nominated by the President from among citizens diplomaed in juridical and social sciences. Art. 30.—The Procurator General shall be one of the Auditors chosen freely by the President; he shall be chief of the Public Ministry, and its organ before the Supreme Military Tribunal in the trial and judging of crimes stated in the law.

The law proceeds to define the functions of the foregoing officials, and it prescribes at length the jurisdiction and the entire procedure of the military courts, both trial and appellate. The military prosecution is begun, (Art. 81), by denouncement, or *ex officio*, which in either case may be preceded by a military police inquest. Art. 82.—The denouncement lies before the Public Ministry; and (Art. 83) must set forth: the recital of the criminal fact with all known circumstances; the name and rank or employment of the accused; the reasons for certainty or presumption of guilt; the names of witnesses, not less than three nor more than six. Art. 84.—A denouncement not containing these legal requisites will not be received. Art. 86.—The person injured may intervene to aid the promotor, but he may not produce witnesses other than those endorsed on the complaint, nor interpose any of the legal recourses or appeal, etc. Art. 88.—The denouncement must be presented by the promotor within five days, under his criminal responsibility.

Art. 256.—Appeal lies from the judgments of the Council of Justice, either finding guilty or not guilty, in cases of manifest nullity of the proceeding, of the judgment, or when the sentence is contrary to the evidence in the record; such appeal may be taken only by the Public Ministry or by the parties (Art. 266). Art. 267.—The appeal shall be interposed by simple petition, within twenty-four hours; the original record being transmitted to the Supreme Tribunal (Art. 268). Art. 272.—Five days are allowed to each party to prepare for hearing, after which the record goes to one of the judges, who after two days' study of it, reports the case fully to the full court; each party then has the right to make oral argument for fifteen minutes; after discussion by the Tribunal, the matter is decided by a majority of votes; if the accused is the appellant, the sentence imposed cannot be aggravated; if the Tribunal annuls the proceeding, it shall order a new trial of the accused. Art. 273.—If the sentence is condemnatory, the President of the Tribunal shall communicate it at once to the Auditor. Art. 274.—In case of absolution, the President shall telegraph it to the Auditor, so that he may release the prisoner.

The preceding extracts relate to those phases of the system of military justice which radically differ from the American court-martial practice. The merits of this, the "continental system," may well be compared with those of the system and practice of American courts-martial.

*Foreign Trade Marks.*—Decree No. 14,520, of December 9, 1920 (D. O. Dec. 14, 1920). The Conference of Buenos Aires, of August, 1919, adopted *ad referendum* a convention relating to a Union of American Nations for the international registration and protection of trade marks and trade names; established two registries, one in Havana, Cuba, and one in Rio de Janeiro; and provided, that every mark duly registered in one of the signatory States should be regarded as registered in all the other States, without prejudice to the rights of third persons and to the internal legislation of each such country. The present Decree recites the establishment of the International Office in Havana, and that the office in Rio has not been yet established because of failure of ratification in due form, and further recites:

"Whereas, the establishment of the Secretarial Office in Rio de Janeiro is not necessary in order that

the marks registered in Havana should enjoy protection in the countries of the Southern Group, it being sufficient that the latter countries have ratified the Convention; and

"Whereas, such interpretation, besides being most in harmony with the spirit of the Convention, has the advantage of assuring at once to the owners of marks registered in Brazil the advantages resulting from said Convention; it is therefore decreed:

"Art. 1.—Until further determination, Art. 30, Section 10, letters c and d, of the Regulations approved by Decree No. 9210, of December 15, 1911, shall be observed with respect to the marks registered in the office of Havana; and with respect to the petitions of the owners of the marks registered in Brazil, who wish to enjoy the protection assured by the said Convention, said Art. 30, Section 8 of the said Regulations, and the Regulations for the Secretariat of Havana, approved by the Decree of the Cuban Government on January 14, 1918, shall be observed."

*Houses for Workingmen.*—Law No. 4209, of December 11, 1920 (D. O. Dec. 16, 1920). The Executive is authorized to carry to completion, by administrative work or by contract, the building and repairs of houses authorized by a previous Law (No. 2407, of Jan. 18, 1911), and to sell or rent the same to workmen, after appraisement and public bidding; to condemn and expropriate lands in the Federal District, to be divided into lots of from 300 to 750 square meters, and to grant them to Federal or municipal officials, workmen or laborers for the construction of houses for themselves, the cost of the lots to be deducted from their pay, up to 30% of the amount of the same; the Government may also apply one-third of the balances of savings banks, up to the amount of ten million contos de réis (10.000:000$000) for carrying out the purposes of the law, besides being authorized to order unlimited loans to be made by the Caixa Economica, directly or through the Bank of Brazil, at a rate of one-half per cent higher than the interest paid on its deposits, such loans, not exceeding 80 per cent of the value of the land, to be secured by mortgage on the respective lots.

*Federal District Election Law.*—Law No. 4215, of December 20, 1920 (D. O. Dec. 26, 1920). This is an amendment of the existing laws on the subject relating to elections in the Federal District. Art. 3 provides that when for any reason the election place in any precinct is not in function, the voters of that precinct may vote in any other precinct of the same municipal district; and if none of the precinct voting places within such district is in function, the voters may vote at any other precinct in any municipal district forming part of the registration district in which the voter may be registered. This is maybe the only novel feature of the amendments, special provisions being made for receiving such votes separately and remitting them to the Returning Board. (See infra, Decree No. 14,631.)

*Business of Insurance Companies*—Decree No. 14,593, of December 31, 1920 (D. O. Jan. 12, 1921). This is a comprehensive Regulation, of 111 Articles, which regulates all kinds of insurance business, domestic and foreign, in Brazil, and provides for their authorization, registration, and inspection, under Government control.

*Repression of Anarchy.*—Law No. 4269, of January 17, 1921 (D. O. Jan. 23, 1921). Art. 1.—To provoke directly, by writing or by other means of publicity, or verbally in meetings held in the streets, theaters, clubs, association headquarters, or any other public place or place frequented by the public, the commission of crimes such as injury to property (damno), depredation, incendiarism, homicide, with the purpose of subverting the existing social organization, shall be punished by imprisonment from one to four years. The following Articles prohibit and punish other crimes with like purpose, such as defending or praising the acts above mentioned, exploding or placing bombs or other explosives, the manufacture of the same, and conspiracy to commit such acts. False statements made in articles of association of certain incorporated societies, with regard to the purposes of the organization, which develop criminal tendencies, exposes the associations to be broken up by the police and the officers and directors to from one to two years imprisonment. The Government may order the closure, for a definite time, of associations, syndicates or trades unions, and civic societies if the same take part in acts contrary to the public welfare.

*Transportation Taxes.*—Decree No. 14,618, of January 11, 1921 (D. O. Jan. 14, 1921). Regulations governing the collection and management of the transportation tax, which is imposed and collected throughout the country for the special purposes of construction and upkeep of railroads, and the maintenance of coastwise and fluvial navigation. This tax applies upon nearly all kinds of merchandise and freight shipped within the country.

*Federal Election Law.*—Decree No. 14,631, of January 19, 1921 (D. O. Jan. 23, 1921). Regulations or Instructions for Federal Presidential and Congressional elections. Art. 1 provides that the ordinary election for President and Vice President of the Republic shall be held on the first day of March in the last year of the Presidential term, by direct suffrage and absolute majority of votes. Art. 2.—The ordinary election for Deputies to the National Congress, and the renovation of one-third of the Senate, shall be held, throughout the Republic, on the first Sunday of February following the expiration of the previous legislature, by direct suffrage of the electors. When such elections coincide with the year of the Presidential election, they shall be held jointly with it on March 1st of said year. Art. 4.—There shall continue to be 212 Deputies, distributed among the several States as prescribed in this Article, the State of Minas Geraes having the highest number, 37, the Federal District 10, and no State less than 4. Art. 61.—The ineligibility of a candidate renders void the votes cast for such ineligible candidate, the candidate having the next highest number of votes being elected; provided, (Art. 62) the candidate having the next highest number of votes shall only be considered elected if he has received more than half of the votes cast for the ineligible; otherwise, a new election shall be held, for which the existing ineligibility shall be considered as continuing.

It is interesting to note the numerous grounds of ineligibility of candidates for Congress. Art. 63.—Ineligible for the National Congress are: I. Throughout the Republic: The President and the Vice President of the Republic, the Governors or Presidents and the Vice Governors or Vice Presidents of the States; the Ministers of State, the Directors of the respective Secretariats and those of the National Treasury; the ministers, directors and representatives of the Minis-

terio Publico in the Tribunal of Accounts; the Chiefs and sub-Chiefs of the General Staff of the Army and Navy; the Federal Magistrates and the members of the Federal Public Ministry, Federal administrative officials who are subject to removal independently of judicial sentence or administrative process; the Presidents and Directors of banks, companies, societies or concerns which enjoy the following favors from the Federal Government: guaranty of interest through subsidy; privilege to issue notes payable to bearer, with or without gold reserves; exemption or reduction of Federal imposts or taxes granted by law or contract; tariff contracts or concessions of lands; zone or navigation privileges. II. In the several States, and in the Federal District: Relatives by consanguinity or affinity in the first and second degrees, of the Governors or Presidents of the States, and their Vices, whether in or out of office, with certain exceptions; together with various State and municipal officials, corresponding approximately to the like Federal officials above indicated. Art. 64.—Ineligible as President or Vice President of the Republic are: The President, for the succeeding Presidential term; the Vice President, who exercises the Presidency in the last year of the Presidential term, for the succeeding period; the Ministers of State or those who have been such within 180 days before the election; the relatives by consanguinity or affinity, in the first and second degrees, of the President and Vice President in office at the time of the election or who had held such office within six months previously.

This brings the record of current Brazilian legislation down to the latest data received up to the time of writing. J. W.

## II. Bolivia

1. *Food Control.*—The President has issued a decree placing the control of food products under the customs division of the Government, which obliges the merchants to furnish a weekly list of their stock. According to this decree the hiding of property will be considered as smuggling, and the Government may confiscate the goods or impose a fine of 50 per cent of the value of the merchandise.

2. *Arbitration Treaty.*—On November 13, 1919, the Congress of the Republic of Colombia approved the General Arbitration Treaty concluded in Bogota between Bolivia and Colombia on November 13, 1918.

3. *Extradition Treaty.*—The President has submitted for confirmation by congress the Extradition Treaty agreed to in Rio de Janeiro on June 3, 1918, and the convention regarding telegraphic and wireless communication signed May 2 of the same year.

4. *Treaty with Great Britain.*—On April 5, 1920, a convention concerning false declarations of origin between Bolivia and Great Britain was signed at La Paz. The convention declares fraudulent the importation and sale in the territory of the two nations of merchandise which, although bearing the marks of the products manufactured in the signatory countries, is found to be of other origin than that declared, and the importer or seller is subject to a fine equal to the total value of the goods in question unless he proves that he has not acted with intention to deceive. The authorities in each country will decide in each case if the declaration of origin denounced as false is or is not included in the stipulations of the convention.

5. *Tax on Mining Profits.*—Congress has passed a law imposing a tax on net mining profits. Mining concerns whose net profits do not amount to 20,000 bolivianos are exempt from taxation.

6. *Passports.*—The ministry of foreign relations has issued a decree regarding the issuance of passports to travelers entering or leaving the country. Passports must contain the signature, age, state, profession, photograph, finger print, distinguishing marks, and height of the bearer. Passports will be valid for one year from the date of issuance. Passports issued to heads of families traveling with the family need only contain the foregoing particulars in regard to the head of the family, the photographs and ages of the other members being sufficient.

7. *Court of Appraisal.*—The Congress has passed a law providing for the creation of a Higher Court of Appraisal, to be presided over by the director general of customs. It will be vested with the following powers: to decide appeals on decisions of values and double taxes made in the first instance by the customs agents; to decide questions raised by merchants regarding articles of doubtful appraisal; and to consider changes in the customs tariff. The same law makes effective the customs tariff of imports compiled by the director general of customs, and which contains 2,270 clauses and 40 general rules for their application. W. S. P.

## III. Chile

1. *Police and Frontier Convention.*—On October 13, 1919, a Police and Frontier Convention between the Argentine Republic and Chile was concluded in Buenos Aires. This convention prescribes the manner of using the police force at the frontier, and calls for reciprocal cooperation of the representatives of public order of both nations, so as to prevent criminals prosecuted in one country from escaping into the other, thereby avoiding the penalties of law. Under the convention, if criminals cross the frontier in armed bands the local authorities have the right to detain them, and the police force following them may continue to do so in the neighboring country until the law-breakers are captured. Frontier police forces are authorized to communicate with each other direct and to solicit mutual cooperation.

2. *Permanent International Commission.*—In the meeting of the Council of State held November 12, 1919, the President of the Republic presiding, the draft of a law was approved to constitute a Permanent International Commission to take up the controversies between Great Britain and Chile which have not been settled by diplomatic means.

3. *Postal and Telegraph Law.*—The President has promulgated the new Postal and Telegraph Law which provides for the fusion of these two services. This law places the postal, telegraph, and telephone branches in charge of a general bureau, whose principal officers are a director general and an assistant director general appointed by the President. The rules and regulations issued in accordance with this law contain the new postal and telegraph tariffs, which became operative April 1, 1920. The postal rate for the special delivery mail known as "expresos" has been increased from 10 to 25 centavos, currency, and parcel post packages weighing less than 1 kilo are charged for at the rate of 1.50 peso, currency, while parcel post packages weighing from 1 to 5 kilos are charged for at the rate of 3 pesos, currency. The postmaster general has been authorized to make the charges on registered foreign mail in accordance with the pro-

visions of paragraph 4 of the final additional protocol to the postal convention of Rome.

4. *Stock Companies.*—The Government has provided for the organization of a committee to study the question of the formation of stock companies and suggest improvements in the present laws relative thereto.

5. *South American Police Convention.*—On February 29, 1920, there was concluded in Buenos Aires between the Governments of the Argentine Republic, Bolivia, the United States of Brazil, Chile, Paraguay, Peru, and Uruguay, duly represented in the International Police Conference, which was held in the capital of the Argentine Republic from the 20th to the 29th of February, a South American Police Convention. The contracting countries permanently agree mutually to furnish to each other information concerning the proposed or actual acts of anarchists which may affect or be considered subversive of public order, and particularly concerning publications issued for propaganda purposes.

6. *Marriage and Civil Registration Laws.*—The council of state at its session of June 4, 1920, approved a bill amending the marriage and civil registration laws. The age prescribed in this bill at which marriage may be entered into without the consent of other persons is fixed at 21 years. Marriage legalizes, ipso jure, children born to the contracting parties out of wedlock. The marriage of recluses, persons in asylums, or persons in danger of death is facilitated. The public registration offices connected with the issuance of marriage documents are increased and regulated so that they are in the reach of everyone; and finally, measures are established intended to improve the personnel of the civil registration office.

W. S. P.

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## IV. Colombia, 1920

Law No. 4 of September 10, (Diario Oficial, September 14) on transportation rates.

Law No. 11 of September 15, (Diario Oficial, No. 17,322, September 20) prohibiting or regulating the importation and sale of pernicious habit-forming drugs.

Law No. 14 of September 23, (Diario Oficial, September 27) amending Law 31 of 1919 on the Tolima and Huila Railways.

Law No. 20 of October 4, (Diario Oficial No. 17,352, October 7) on judicial districts.

Law No. 21 of October 4, (Diario Oficial No. 17,352, October 7) amending Law No. 78 of 1919 on Strikes, and providing procedure for direct settlement, conciliation boards and arbitration.

Law No. 26 of October 8, (Diario Oficial, October 11) on the Santa Marta Railway.

Law No. 34 of October 19 (Diario Oficial No. 17,372, October 21) prescribes that the rate of taxation by Departments or Municipalities on real estate cannot exceed 2 per mil. Valuations for assessment purposes must be revised every two years. No direct national, departmental or municipal taxes can be levied on property of municipalities.

Law No. 37 of October 19 (Diario Oficial No. 17,384, October 28) authorizes the coinage of 3,000,000 pesos in silver and 1,000,000 pesos in nickel and amends sundry prior coinage laws.

Law No. 43 of October 28 (Diario Oficial No. 17,384, October 28) directs the sending of a Commercial Mission to Japan.

Law No. 45 of October 29, (Diario Oficial No. 17,386, October 29) amending the Penal Code in regard to Convict Labor.

Law No. 46 of October 30, (Diario Oficial No. 17,390, November 2) on river improvements, and the Carare and Central Northern Railways, amending Laws 119 of 1913 and 60 and 114 of 1919.

Law No. 47 of October 30 (Diario Oficial No. 17,390, November 2) prohibits the export of historical material except under special authorization and contains other provisions in regard to public libraries, academies, museums, legations, etc.

Law No. 48 of November 3, (Diario Oficial No. 17,392 November 3) on Immigration and Emigration. Passports visaed by a Colombian consulate are required for entry. Causes for exclusion are physical or mental disease, vagrancy, white slave traffic, anarchism, conviction for crime other than political offences (Art. 7). Undesirable aliens may be deported by decree of the Executive; among other grounds for expulsion are violation of neutrality, intervention in internal politics, either by publications in the press, speeches or affiliation with political societies.

Law No. 52 of November 4, (Diario Oficial, November 4) amending Law 56 of 1904 and Legislative Decree 39 of 1905 on Registry fees.

Law No. 60 of November 8 (Diario Oficial No. 17,400, November 8). Sundry provisions on the Diplomatic and Consular Service. The Private Postal Agent of Colombia in Panama (Colombia has never officially recognized the independence of Panama) is given power to act as a Notary; instruments authorized by him may then be registered in Colombia (arts. 2 & 3).

Law No. 67 of November 11 (Diario Oficial No. 17,406, November 11) regulates the practice of medicine.

Law No. 68 of November 11 (Diario Oficial No. 17,406 November 11) enacts the adherence of Colombia to the Treaty on Procedural Law entered into by the Plenipotentiaries of Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay at Montevideo on January 11, 1889. This treaty is a well known contribution to Private International Law. Under the rules of this treaty not only judgments and letters rogatory but also public instruments, duly legalized, executed in one country are given faith and credit in the other signatory countries (arts. 3 & 4). (For a translation see Obregon's Latin-American Commercial Law, page 829 seq.)

Law No. 76 of November 15, (Diario Oficial No. 17,412 November 15) Police Regulations for Railroads. Railroad companies are obligated to fence in the right of way and provide gates or guards at grade crossings (art. 8). Obstruction of the track is made a criminal offence (art. 21). Government inspection is provided for.

Law. No. 80 of November 16, (Diario Oficial No. 17,417, November 17) on the Sabana railway.

Law No. 81 of November 17, (Diario Oficial No. 17,417, November 17) amending Law No. 20, *supra*, on Judicial Districts.

Law No. 83 of November 18, (Diario Oficial No. 17,418, November 18) amending Laws 105 of 1890 and 40 of 1907 on rights of settlers on public lands.

Law No. 84 of November 18, (Diario Oficial No. 17,418, November 18) on Expropriation for Public Use, amending (art. 9) Laws No. 56 and 119 of 1890, 104 of 1892, 35 and 53 of 1915, 21 of 1917 and (see art. 8) 127 of 1919.

Law No. 85 of November 19, (Diario Oficial No. 17,424, November 22) repealing arts. 48, 56 and 66, and amending arts. 67, 69 and 70 of the Fiscal Code and arts. 1 and 2 of Law 119 of 1919, in relation to public lands. No grant may be made to any one natural or juristic person, directly or indirectly, in any Department or Territory, of more than 2,500 hectares, or, if for agricultural purposes, 1,000 hectares (art. 1). Ownership reverts to the nation if within 10 years, two-thirds of the lands granted have not been stocked or one-fifth cultivated (art. 2).

Law No. 86 of November 20, (Diario Oficial No. 17,426, November 23) on the Choco railway.

Law No. 87 of November 20 (Diario Oficial No. 17,426, November 23) prohibits any national or departmental consumption tax on coffee.

Law No. 88 of November 20 (Diario Oficial No. 17,426, November 23) approves a contract whereby the nation is to acquire the shares of the Colombian National Railway Co., Ltd.

Law No. 89 of November 20 (Diario Oficial No. 17,426, November 23) authorizes the Government to extend the time for redemption by the banks of mortgage certificates (*cédulas*) prescribed by Law 108 of 1919.

Law No. 90 of November 20, (Diario Oficial No. 17,429, November 24) amending provisions as to writ of error (*casacion*).

Law No. 92 of November 23, (Diario Oficial No. 17,430, November 25) on Judicial Reforms, amending arts. 124, 329, 991, and 1737 of the Judicial Code, and 149 of Law 40 of 1907 and repealing arts. 1 and 2 of said Law 40 of 1907.

Law No. 93 of November 23, (Diario Oficial No. 17,430, November 25) amends the Tariff Law, No. 117 of 1913.

Law No. 97 of November 25 (Diario Oficial No. 17,440, December 1) permits the export of gold and silver in dust, bars or amalgam from mines (but not melted down from coin) and in jewelry for personal use. The export of gold coin, except under special license, is prohibited until export of gold from European and American countries is again permitted. Penal sanctions are imposed for violations of the law.

Law No. 98 of November 26, (Diario Oficial No. 17,440, December 1) creates Childrens' Courts and Houses of Correction.

### International Law

Decree No. 1851 of October 5, 1920 (Diario Oficial No. 17,352 of October 7th) appoints delegates to the First Assembly of the League of Nations at Geneva.

### Constitutional Law

An amendment of Legislative Act No. 1 of 1918 was passed by Congress on October 11 (Diario Oficial No. 17,358, October 13). It does not become effective unless favorably acted on by the 1921 Congress. The amendment provides:

> Any person may engage in any licit (*honesta*) trade or occupation without need of belonging to any guild of artisans or professional men. The authorities shall inspect industries and professions in all matters respecting public morality, security or health. The law may restrict the production and consumption of liquors and fermented beverages. The law may also direct the revision and control of the tariffs and regulations of public transportation enterprises and require certificates of fitness for the practice of the medical and similar professions and of the law. Legislative Act No. 1 of 1918 is substituted by the foregoing.

P. J. E.

### V. Costa Rica, 1920

Decree No. 41. August 21, (La Gaceta No. 192, August 22) *Law of Nullifications.*

Annuls, with certain exceptions, the acts of the unconstitutional Tinoco régime. Article 1 declares null and void *ab initio:* the Constitution of June 8, 1917: all contracts between the Executive and private individuals between January 27, 1917, and September 2, 1919; certain decrees and resolutions on currency, checks, and bank note issues; codes and other laws and all other acts executed by the usurping régime. Article 2 excepts, however, and declares the legal validity of certain currencies and bank note issues; the proceedings and judgments of the Courts (other than military tribunals); the provisions in favor of the Treasury (Fisc) to the extent of the benefits; payments to civil servants authorized by the Budget; payments for supplies, actually of benefit to the State; contracts between private parties entered into on the supposition of the existence of laws passed during said régime, not affecting the revenue or property of the State; recognition of diplomatic and consular officers; executive and administrative acts validated expressly by the Executive Power within six months; Law No. 5 of July 31, 1917; decree No. 4 of August 27, 1917; pensions; naturalizations, decorations, etc., emancipations of minors. The Supreme Court is ordered to draft a revision of the Penal Code of 1918 (Article 4).

Decree No. 100, December 9 (La Gaceta, No. 287, December 17) establishes an eight hour day for laborers on farms and factories and a ten hour day for clerks and office employees; overtime to be paid extra, 25% for the first three hours, and 50% if over three hours; in no case shall the working hours exceed fifteen and then only if the good health of the laborer be proven.

P. J. E.

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### VI. Cuba, 1920

February 1 (Gaceta Oficial, February 1, Special) establishing Martial Law for sixty days.

March 2 (Gaceta Oficial, March 4). Personnel and duties of the National Secret Police.

March 19 (Gaceta Oficial, March 25) revoking law of February 1st on Martial Law.

March 26 (Gaceta Oficial, March 26) reenacting Article 120 of the Electoral Code.

June 30 (Gaceta Oficial, July 1 Special) additional recompense to public officials; stamp taxes, amendment of Law of July 31, 1917.

July 15 (Gaceta Oficial, July 20) removes the disability of Registrars of Property to election as Senators, Representatives and Provincial Councillors; amending Article 387 of the Regulations of the Mortgage Law.

Executive Decree, October 10 (Gaceta Oficial Special No. 43, October 10). *Moratorium.* Bills of Exchange, drafts, promissory notes, warrants, due bills and other credit instruments due or that may become due up to the first of December next shall not be enforced until that date (Article 1). Credits under a mortgage, pledge or simple public instrument, due or that may become due within the term referred to in the foregoing paragraph shall not be enforced until that date (Article 1). Credits under a mortgage, pledge or simple public instrument, due or that may become due within the term referred to in the foregoing para-

graph shall not be enforced and are extended until the first of December (art. 2).

Auctions ordered in judicial or administrative proceedings are suspended and may be ordered for after December first next and until after said date no forced sales or auctions of any kind shall be held (Article 3). Within said term and from the date of this decree, depositors of banks or bankers in the Republic may only demand, in accounts current, ten per cent. of their deposits, and in savings accounts under 2,000 pesos, twelve per cent, unless a Special Commission of bank examiners increase such percentage in accordance with the state of the accounts (4, 6). Checks drawn by depositors however are to be received in payment of duties and taxes (7) and the obligations of the National Bank of Cuba as fiscal agent and Government depository not to be affected (5).

By subsequent decrees, the moratorium was extended until the passage of the Torriente Act on January 27, 1921, establishing a moratorium, with instalment payments, until April, 1921. The following is a translation:

Article I—Rights of action arising out of obligations of a mercantile character, contracted prior to October 10, 1920, evidenced by bills of exchange, drafts, promissory notes, warrants, due bills and other documents of credit embraced in the Code of Commerce, whether due or to become due within 105 days from the date on which this law becomes effective, shall not be enforced until after the expiration of said period of 105 days unless debtors in such cases fail to make payment to their creditors as follows: 15 per cent within 15 days, 25 per cent within 45 days, 25 per cent within 75 days, 35 per cent within 105 days, from the date on which this law becomes effective.

Failure to pay any one of said installments will permit the exercise of the rights of action.

The provisions of this article do not apply to obligations which have to be fulfilled with the proceeds of the sale or pledge of cane, sugar or molasses, or arising from the transfer of the price of these products, but such contracts must be fulfilled according to their terms.

Article II—Rights of action in favor of those who on October 10, 1920, were depositors of Banks, Bankers, and Savings Institutions in the Republic, to demand the repayment of such deposits shall not be enforced until after the expiration of 135 days from the date on which this law becomes effective, except in case of the failure to repay such deposits as follows: 15 per cent within 15 days, 15 per cent with 45 days, 20 per cent within 75 days, 25 per cent within 105 days, 25 per cent within 135 days, from the date on which this law becomes effective.

Failure to pay any one of said installments will permit the exercise of such rights of action. Any sum paid to depositors in excess of payments provided for in the decree of October 10, 1920, shall be computed in these installments.

Article III—Banks, Bankers and Savings Institutions which may desire to avail themselves of the provisions of this law shall, within 15 days from the date on which this law becomes effective, notify the Executive Power, through the Secretary of the Treasury, who, through one or more officials to be appointed for this purpose, will intervene in and supervise them, and while this law remains in force such Banks, Bankers and Savings Institutions shall not transact business of any kind without the intervention of the representatives of the Government, this, however, without involving the State in any responsibilty on account of such transactions.

Any persons, firms or corporations, other than Banks, who may desire to avail themselves of the provisions of Article I, shall, within 15 days from the date on which this law becomes effective, give notice in writing to the municipal judge or Judge of First Instance, at their domicile, as follows:

To the Municipal Judges in case their capital does not exceed $5,000 according to the Mercantile Register. To the Judges of the Court of First Instance in case their capital exceeds $5,000 according to said register.

From the day on which the petition or notice in writing is filed, the parties in interest shall enjoy the benefits of this law.

Article IV—The officials designated in the preceding article will, under their responsibility, see that the Banks, Bankers and Savings Institutions under their supervision collect their outstanding debts and pay their depositors the installments provided for in Article II.

Article V—The debtors of Banks, Bankers and Savings Institutions on account of obligations covered by Article I shall pay in cash according to the provisions of said article without prejudice to their right to deliver, for purposes of set-off of the whole or part of their remaining indebtedness, credits in their favor represented by certified checks drawn upon the same Bank, Banker or Savings Institution.

Article VI—Rights of action arising out of mortgages, pledges or credits under public instrument of any kind prior to October 10, 1920, shall not be enforced as to principal until the expiration of 105 days from the date on which this law becomes effective and shall be subject to the provisions of Article I if the debtors prove that their default is due to their inability to withdraw from their deposits with Banks, Bankers and Savings Institutions the sums required for this purpose on account of the moratorium decreed by the Executive and by the provisions of this law. This proof shall be by means of a special prior interlocutory proceeding which may be instituted in any kind of legal proceeding and at any stage thereof.

In support of such proceeding the party in interest must file with his first papers an affidavit before a notary that he is so situated and that he has no other funds with which to fulfill his obligation; and also a certificate under oath by the director or manager of such Bank, Banker or Savings Institution who must execute such certificate within 24 hours after it is requested; said affidavit must show that the deposit was made prior to October 10, 1920, that it exceeds the amount claimed and that no certified check has been issued against the deposit and that it is not affected to the payment, or subject to the fulfilment, of any other obligation. If from such documents the plea of the debtor is not fully established, then the judge shall deny his application and the debtor shall have no recourse other than an appeal without a stay. So long as the debtor does not file with the Bank, Banker or Savings Institution a certificate duly attested by the Court to the effect that the obligation has been extinguished or that the proceedings have been discontinued, the Bank, Banker or Savings Institution shall retain impounded so much of the deposit as is necessary pending the outcome of the claim.

The provisions of this article do not apply to rights of action for the collection of matured interest.

Article VII—The provisions of this law do not affect any funds whatsoever of the State, of the provinces, of municipalities, nor of other official bodies, or which appear in the name of certain public officials for payment for their account or for that of individuals who may have delivered such funds for that purpose. Nor do such provisions apply to the funds of the American International Union for the Protection of Trade Marks. Likewise the funds donated in any form for the promotion of public education and for scholarship prizes are not affected.

Article VIII—The Executive Decree of October 10, 1920, and the extensions of same of November 27th and December 31, 1920, shall become inoperative from the date on which this law becomes effective.

Article IX—This law shall become effective three days after its publication in the Official Gazette of the Republic and the effects of the provisions of the preceding articles shall become inoperative the day after the expiration of the period of 135 days from the date on which it goes into effect. Thereafter all persons affected by this law shall be at liberty to exercise their rights in accordance with the laws of procedure in force and the Executive Power shall have no power to impede such exercise by new Decrees like those referred to in the preceding article.

Additional Article—The funds of the State, the provinces, and municipalities shall in future be deposited only in their respective treasuries and their obligations shall be paid by drawing against the funds so deposited.

Likewise, no person or private corporation shall be appointed fiscal agent or to collect and disburse their funds. For all payments required by the foreign service

of the Republic, the Executive will make such contracts as he considers advisable.

Executive Decree 1641, September 30 (Gaceta Oficial, October 26). Regulations on the Four Per Cent Profits tax. The following is a translation of the principal provisions:

Article 1—There is established by paragraph 4, Article 4 of the Law of July 1, 1920, a tax of four per cent (4%) on the profits of every corporation, mercantile establishment or business, operating in the territory of the Republic. If such business be incorporated and domiciled abroad, this tax shall apply to profits realized on transactions or operations carried on in Cuba, provided the capital of such business exceeds ten thousand pesos ($10,000), as shown by its statements, records in the Mercantile Register or Commercial Classification for Taxation purposes, or if the profits judged from outward appearances, other means of proof lacking, exceed two thousand pesos ($2,000).

Article 2—The following shall pay this tax:

(a) Corporations, companies, enterprises or private individuals possessing an establishment or carrying on business transactions in the territory of the Republic, and having a capital exceeding ten thousand pesos ($10,000), when the profits from such transactions or operations exceed two thousand pesos ($2,000).

(b) Foreign corporations, enterprises or companies and private individuals non-resident in Cuba carrying on business within the national territory, if the capital or investment be more than ten thousand pesos ($10,000), or if the profits be greater than two thousand pesos ($2,000).

(c) Those who operate on their own account or that of other persons are subject to this tax.

Article 3—Payment of municipal taxes shall not exempt from payment corporations or individuals subject to this tax, regardless of the grounds alleged to prove such an exemption.

Article 4—Banks of issue and discount and stock corporations shall continue to pay a tax of eight per cent (8%) on their profits according to Order 463 of 1900. Partnerships (commercial or industrial) organized in Cuba or abroad, and individuals engaged in the cultivation of sugar shall pay also a tax of eight per cent (8%) on profits in accordance with the Law of July 31, 1917, and the Law of July 1, 1920. The banks and those engaged in the banking business, public service railroad companies and shipping companies shall pay six per cent of their annual net profits, under Order 463 of 1900 and the Law of July 31, 1917.

Insurance companies, as provided for by the law of July 1, 1920, shall pay a tax of two and one-half per cent (2½%). This shall be paid also by mutual insurance companies and by insurance agencies.

Mining property, as provided in the law of July 1, 1920, shall pay a tax of six per cent (6%) on profits, and, in addition, a tax of twenty centavos (20 cents) on each hectare of land denounced, whether or not such property be exploited.

The provisions of the Regulations of August 28, 1917, as amended, shall continue to govern the collection of these taxes.

Article 5—Profits of mercantile corporations in general and those realized in business transactions of any class, consummated on or after July 1, 1920; and profits realized in commerce and industry in general and by private individuals engaged in business on and after January 1, 1921, are subject to a tax of four per cent (4%), in accordance with Article 5 of the law of July 1, 1920. The collection shall commence January 1, 1921.

Article 6—The administration, investigation and collection of this tax shall be under the charge of the Treasury Department and the offices of the Administrator and Collector of Taxes and Revenues of the fiscal zone or district in which the taxpayer is domiciled. The administrators of these different offices shall proceed with the collection of the tax in the manner outlined in these regulations. The domicile of corporations shall be that recorded in its articles of incorporation.

If the articles of incorporation be executed abroad and do not designate the place of business in the National territory the place in which it carries on its business shall be so understood.

The place in which the factory or establishment is situated shall be understood as the place of business.

Article 8—Corporations, enterprises, industrial or commercial companies and private individuals domiciled abroad having a business organized in Cuba, are obliged to maintain in the Republic a representative or agent, who shall have full powers to deal with the Administration and to liquidate and make effective the amount of this tax with relation to the profits obtained. Such corporation, enterprise, company or person must inform the office of the Administration and Collection of Revenues and Taxes in the corresponding district in which said representative or agent is apparently domiciled, the name of such representative or agent. In case of failure to comply with this requirement, the Adminstrator shall regard as such those persons or corporations who direct the business or who have charge of the office or establishment which carried on the business.

Article 9—Every merchant or manufacturer and private individual who carried on operations or transactions embraced by this tax shall keep his books in the form established by the Commercial Code now in force. If he be not obliged to keep books in conformity with the Commercial Code, he shall record the transactions with full explanations and in a clear manner.

Article 10—Those subject to this tax shall be, by this provision, directly responsible for its payment and if attachment be necessary, such proceeding shall be carried on in accordance with the provisions of Order 501 of 1900.

Article 11—The stocks of the establishment and other property of the taxpayer, by this provision, shall constitute a lien for the payment of this tax, it being understood that the state has priority over any other creditor according to the Mortgage Law now in force.

Article 12—Those who by transfer or sale acquire any establishment or mercantile business obliged to pay the tax provided for by this law must make certain that their predecessors are current in the payment of this tax, otherwise they shall be responsible for pending debts by express provision, the stocks and other articles of sale of transfer constituting a lien to which the State shall have preference over any other creditor.

Article 15—The taxpayer must give account of all change in the ownership of stock, sale, transfer, or establishment or mercantile business subject to this tax, to the office of the Administration and Collection of Taxes and Revenues of the corresponding district, within ten days following such exchange, sale or transfer, presenting a new declaration in duplicate as provided for in Article 13, a copy of which must be submitted also to the Secretary of the Treasury.

When one subject to this tax transfers his establishment to some other location within the same district, or to another district, he shall so inform the office of the Administration of the corresponding fiscal district within ten days.

When one ceases to carry on operations subject to this tax, or terminates his business, he shall so inform the Administration of the corresponding fiscal district on a printed form which shall be furnished for this purpose, paying at the time of the declaration of his suspension of business, the amount of tax then due.

Article 18—Those subject to this tax shall submit during the month following the expiration of each semester of the calendar year, to the office of the Administration and Collection of Taxes and Revenues of the corresponding fiscal zone or district, returns in triplicate of their operations, and during the month which completes the fiscal period shall submit a general return. The amount of the tax shall be computed on the returns submitted and collection shall be made without prejudice to the investigation and verification which may be deemed desirable.

Article 19—Settlement for the amount of this tax must be made to the Administration of Revenues within thirty days from the date of presentation of the returns mentioned in the foregoing article.

Article 27—The Administration shall have the right at any time, through the medium of public officials designated for the purpose, to examine the books and documents of those subject to this tax, in order to verify

the correctness of the operations and the expenses incurred.

Article 33—All articles of incorporation or modification or dissolution of a company, corporation or enterprise, change of firm name, or any other alteration in the property, management or administration of an establishment or commercial business which is presented for liquidation in the Office of the Administrator of Taxes and Revenues of the fiscal zones or districts shall be duly recorded in accordance with the law for the collection and fiscalization of the tax to which the present regulations refer.

Article 34—In cases where a taxpayer fails to present documents required by this provision within the month following the period for which he ought to have presented them, the tax shall be collected from him on the basis of this declaration of the previous year, by attachment if necessary, without prejudice to the investigations which the Administration of Taxes of the corresponding district may carry on to fix a definite liquidation and to demand the tax, the expenses of such investigation being on the account of the violator. Notice of such act, when it occurs, shall be given to the Treasury Department by the Administrations of the districts.

## VII. Ecuador

Executive Decree No. 2, January 24, 1920 (Registro Oficial No. 1007, February 2) fixes exploitation taxes on oil fields for 1920 at 6% of the gross product (Article 1), calculated on the market price at Guayaquil at the date of shipment from the well (Article 7). Such shipments can only be made under way-bills issued by the Ministry of Hacienda (4-6) and proof of payment is a prerequisite to export (Article 8).

Executive Decree, January 31, 1920 (Registro Oficial No. 1017, February 13) amends Executive Decree of June 23, 1919, and fixes the rate of exchange for the United States at 213%, that is 2.13 sucres to each dollar; other exchanges being fixed according to the New York market rate, the decree setting forth a table of equivalents for consular salaries and custom house operations. These were modified by subsequent decrees; see for example decrees of May 31 and June 30 (Registro Oficial No. 1131, July 7).

Executive Decree March 15, 1920 (Registro Oficial No. 1055, March 30) amended July 5 (Registro Oficial No. 1151, July 31) restricting Chinese immigration.

P. J. E.

## VIII. Honduras

Legislative Decree No. 8, January 22 (La Gaceta, No. 5283, February 13) prescribes the formalities for the inauguration of a new President. The outgoing President, in the presence of Congress, Magistrates of the Supreme Court, Cabinet Ministers and Diplomatic Corps, delivers with an appropriate address, to the presiding officer of the Congress, the Constitution and National flag; the presiding officer delivers these Sacred Symbols to the President Elect, who thereupon takes the oath of office.

Legislative Decree No. 67, April 5 (La Gaceta, No. 5390, June 19) imposes a 10% export tax on silver. (Note: by Legislative Decree No. 7, May 1, 1920, La Gaceta, No. 5424, August 2, renewing for twenty years from January 1, 1921, the concession granted to the New York and Honduras Rosario Mining Company, the principal in the Republic, exemption is granted from export taxes on all products of the Rosario Mine).

Legislative Decree No. 78, April 8, (La Gaceta 5401, July 8) amends Consular Regulations of March 14, 1906, and amendments thereto, as to fees,—2% on the value of the merchandise is the charge for consular invoices (Article 1).

Legislative Decree No. 91, April 13, (La Gaceta 5404, July 8) approves the Treaty of Peace of Versailles and declares peace between Honduras and Germany.

P. J. E.

## IX. Nicaragua, 1920

Decree No. 7, January 8 (La Gaceta No. 16, January 21) approves the Convention with Mexico, dated Managua, August 9, 1919, re Diplomatic Correspondence.

Decree No. 2, January 16 (La Gaceta No. 19, January 24). Regulations for procedure in impeachment cases.

Decree No. 6, January 7 (La Gaceta No. 19, January 24). Reenacts Articles 118 and 119 of the Organic Judiciary Law and repeals Article 2 of the Law of February 7, 1918.

Decree No. 10, February 4, (La Gaceta No. 28, February 4) authorizes acceptance for bonding purposes of Guaranteed Customs Bonds.

Decree No. 23, February 11, (La Gaceta No. 45, February 28) amends Article 108 of the Code of Criminal Procedure. The amendment takes away the right of bail for those pending trial for certain offenses against the family and morality.

Decree No. 35, March 6, (La Gaceta No. 63, March 16) amends Article 1155 of the Commercial Code to read as follows: "Other foreign moneys, in specie or fiduciary, shall not be obligatory legal tender and shall have no other value in the Republic than their commercial value in the market." (Note: La Gaceta No. 88, April 17, 1920, reprints the Oil Law, No. 120 of December 30th, 1919).

Decree No. 32, July 6, (La Gaceta No. 158, July 10) abolishes system of bank stamps for the payment of direct taxes. The receipt of the National Bank shall be taken in payment.

Decree No. 2, November 29, (La Gaceta No. 280, December 7) amends Article 1703 of the Code of Civil Procedure, so as to provide that property in use for a public service, such as railways, tramways, lighting and water plants, etc., may be levied on, but that the embargo shall not be an obstacle to continuing the service.

Decree No. 3, November 29 (La Gaceta, No. 280, December 7). The provisions of the Code of Commerce are applicable even to Railroad and Steamship enterprises that have obtained or may obtain concessions approved by the Legislature; but solely in respect to matters not provided for in the concession.

Decree No. 9, December 9, (La Gaceta, No. 283, December 11) authorizes a contract with its New York Bankers and the National Bank of Nicaragua permitting the Government to use surplus revenues for making loans to farmers through the Bank as its agent, under approval of a special commission. The enforcement of the security for such loans is facilitated by special exemptions from the ordinary rules of procedure.

P. J. E.

## X. Panama

1. *Taxes.*—An executive decree of October 8, 1919, regulates the collection of taxes on real and personal property, and provides for the taking of a property census throughout the Republic. The President has also approved a decree of the Governor of the

Department of Panama authorizing municipal councils to levy, regulate and collect certain taxes.

2. *Estates of Foreigners.*—On October 4, 1919, the President of the Republic issued a decree concerning the estates of foreigners not covered by treaties. According to said decree, as soon as the judge learns the nationality of the deceased foreigner it is his duty to advise the consul of his country, and in the absence of a consul the department of foreign relations. The judge shall temporarily deposit or place under the custody of the consul, or, in the absence of a consul, of a person chosen from a list of names furnished by the department of foreign relations, the property of the decedent. The judge shall fix the day and hour to make an inventory and appraisment of the property, and after complying with the foregoing requirements shall see that the provisions of articles 1544 and 1559 of the Judicial Code are carried out.

3. *National Codification Revising Committee.*—At the request of the chief justice of the supreme court, the President issued, on October 24, 1919, a decree outlining the following work to be done by the National Codification Revising Committee: A comparative study of the different national codes; preparation of proposed laws which the committee may deem necessary to clarify doubts, eliminate contradictions, supply omissions, amend improper or defective provisions contained in said codes, and the preparation of a penal code, if it should deem expedient, to take the place in whole or in part of the one now in force.

4. *Convention of Commercial Arbitration.*—On January 1, 1920, the Convention of Commercial Arbitration went into effect, which was signed by the Association of Commerce of Panama and the Chamber of Commerce of the United States. The object of this agreement is to preserve cordial commercial relations between the residents and merchants of the respective countries, using a system of arbitration to decide trade controversies in an impartial, economical, and expeditious manner. The clauses of this convention are the same as those of the convention signed by the Chamber of Commerce of the United States and similar associations of Buenos Aires, Rio de Janeiro, and Montevideo.

5. *Treaty of Versailles.*—The national assembly of Panama approved on January 8, 1920, the Versailles Treaty of Peace, signed on June 28, 1919, by the representatives of Panama and other allied nations, and the representatives of Germany.

6. *School of Law and Political Science.*—On April 28, 1920, the President of the Republic issued a decree providing for a three years' course in the School of Law and Political Science of Panama. The studies in these courses during the first two years is the same, but they differ in the third year. The department of public instruction proposes to establish at some future time a fourth year's course to these studies. The subjects taught are as follows: Political economy, civil law, international law, public and private law, and constitutional law.

W. S. P.

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## XI. Salvador

Legislative Decree, June 24, 1920, (Diario Oficial No. 139, June 26) amends Legislative Decree of July 16, 1918, amending Article 54 of the Code of Criminal Procedure.

Legislative Decree, July 7 (Diario Oficial No. 149, July 10) ratifies the treaty between the United States and Salvador on Commercial Travelers, signed at Washington, January 28, 1919.

Legislative Decree, July 16 (Diario Oficial No. 156, July 20) regulates the monetary system. The theoretical unit is called "colon" of 836 milligrams of gold, 900 fine, divided into 100 centavos. Gold coins of 5, 10, 20 and 40 colones and subsidiary nickel and silver coinage are authorized (Articles 1-3). Gold coin, either national or of the United States, is legal tender, and of obligatory acceptance by public offices as well as private parties, dollars being rated as equivalent to two colones (Article 7). Silver coinage, national and of the United States, is legal tender up to 10% of the amount payable (Article 8). Limitations are placed on the amount of silver and nickel coinage authorized (Article 9). Foreign money, except United States gold and silver, is not lawful currency (Article 10). Obligations contracted in foreign money are payable by delivery of an equivalent amount in colones or United States gold, at the rate of exchange at the time and place of payment (Article 11). The authority to coin money is vested in the Executive, subject to prior authorization by the National Assembly (Article 12) and control of the currency is vested in the Ministry of Hacienda (Article 16). The use of tokens, notes or other substitutes for money is prohibited under criminal penalty (Article 15).

Legislative Decree, July 16, 1920 (Diario Oficial No. 156, July 20) amends Article 1440 of the Civil Code by the addition of the words "If the obligation be in money, the debtor may pay in money of legal currency, at the rate prescribed by the law. This right cannot be waived by the debtor," and Article 1957 of the Civil Code to read "If money has been loaned, the numerical sum stated in the contract is owed, either in the kind of money agreed on or in an equivalent amount in legal currency at the rate prescribed by the law. This right cannot be waived by the debtor."

Legislative Decree, July 19, 1920 (Diario Oficial No. 156, July 20) prohibits, under penalty of fine and imprisonment, contracts altering the legal value of national money.

Legislative Decree, July 16, 1920 (Diario Oficial No. 159, July 23) amends subdivision 5 of Article 244 of the Commercial Code to read, "the par value of each share shall be determined by the incorporators in general meeting" and repeals subdivision 6 of said article.

Legislative Decrees, July 22, 1920 (Diario Oficial No. 162, July 27 and No. 164, July 29) amend Articles 3 and 13 of the Law of Stamped Paper.

Legislative Decree, July 26, 1920 (Diario Oficial No. 163, July 28), in order to facilitate and render less costly the institution of civil marriage, amends and the following articles of the Civil Code: 111, 123, 131, 132, 134, 142, 177, 178, 322, 331. Publication of banns may be dispensed with, and exemptions from fees are provided if the man be a laborer, domestic servant or poor.

Legislative Decree, August 9, 1920 (Diario Oficial No. 167, August 9) amends the Sanitary Code.

Legislative Decree, November 22, 1920 (Diario Oficial No. 253, November 22) amends articles 26 and 66 of the Pharmacy Law.

Executive Decree, September 29, 1920 (Diario Oficial No. 210, September 29) appoints delegates to the First Assembly of the League of Nations at Geneva.

P. J. E.

### Salvador—2

1. *Members of Permanent Court of Arbitration.*—The president has appointed the following persons as members of the Permanent Court of Arbitration at The Hague: Drs. Juan Francisco Paredes, formerly minister of foreign relations, justice, instruction, and beneficence; Don Manuel Castro Ramirez; and Don Alonso Reves Guerra.

2. *Course in Diplomacy.*—In the meeting of the University Council held in San Salvador on February 6, 1920, it was planned to start a synthetic course of diplomacy to prepare academicians and students for this important career.

3. *League of Nations.*—On March 10, 1920, the National assembly ratified an executive decree of the 5th of March, 1920, under the terms of which Salvador adheres to the League of Nations, which forms part of the Treaty of Peace concluded in Versailles on June 28, 1919, between the allied and associated countries and Germany.

4. *Central American International Office.*—In a meeting held on May 15, 1920, by the Central American International Office it was decided to send delegations from this institution to each one of the five Republics of Central America, each delegation to be composed of five members from each country, to submit observations and data relative to the Central American Union. The delegation from El Salvador is composed of Drs. Francisco Dueñas, Francisco Martínez Suarez, Miguel Tomás Molina, Manuel Delgado, and Victor Jerez.

5. *Exploration and Exploitation of Petroleum Deposits.*—The Congress of Salvador has passed a law governing the exploration and exploitation of petroleum deposits. Under this law special concessions may be given by the executive power for the exploration and exploitation of petroleum deposits and allied industries, but concessions shall not be granted to foreigners or foreign companies except on the following conditions: (a) That they agree to abide by the general laws of Salvador, and especially the mining laws of the Republic, and shall not appeal to their Governments until all means granted under the laws of Salvador have been exhausted, and (b) that all foreign companies shall have their domicile in the capital of the Republic and maintain a legal representative there. No concessionaire shall transfer his concession to third parties without the consent of the executive power. Failure to comply with these conditions will cause a forfeiture of the concession.

6. *Permanent Vigilance Board.*—An Executive decree of July 20, 1920, establishes a Permanent Vigilance Board, whose duty it is to see that the laws concerning banks of issue are complied with. The jurisdiction of the board extends to branches of foreign banking houses, and domestic banks which accept deposits in cash or securities.

W. S. P.

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### XII. Santo Domingo, 1920—Executive Orders of the Military Government

No. 379, January 2, (Gaceta Oficial No. 3080, January 10) suspends Law of Mines of June 8, 1910 and Regulation thereof of July 27, 1910.

No. 382, January 10, Gaceta Oficial No. 3082, January 17) amends arts. 66, 70 and 72 of the Penal Code to read as follows:

66. When the accused is under 18, and it is deemed he acted without discernment, he shall be acquitted; nevertheless, in view of the circumstances, he shall be turned over to his parents, or taken to a House of Correction for detention and education, during such time as the judgment may determine, which shall not, however, extend beyond his majority.

70. The punishment of public labor shall never be imposed on culprits who have attained the age of 60 at the time of judgment.

72. Upon attaining the age of 60, any one condemned to public labor shall be relieved thereof; and treating him as if he had been sentenced only to confinement, he shall be detained in a house of correction for the remainder of the term for which he has been sentenced.

No. 384, January 14, (Gaceta Oficial No. 3083, January 21) authorizes the Executive to grant pardons, etc.

No. 385, January 15, (Gaceta Oficial No. 3083, January 21) abolishes the Censorship, (art. 1), but prohibits, in the interest of public order, publications teaching anarchy or doctrines contrary to morality or inciting disorder (art. 2). The right of assembly and free speech shall not be impeded except when necessary to preserve order (art. 3). Criminal penalties are provided (arts. 4 & 5).

No. 442, March 30, (Gaceta Oncial, No. 3105, April 7) amending arts. 2 and 4 of the Marriage Law (No. 375).

No. 463, April 22, (Gaceta Oficial, No. 3110, April 24) amending the Law of Communal Organization.

No. 461, March 27, (Gaceta Oficial, No. 3111, April 28) on storage of inflammable articles.

No. 466, April 24, (Gaceta Oficial, No. 3114, April 28) amending the Lottery Law.

No. 452, April 10, (Gaceta Oficial, No. 3113, May 5) Civil Service Law.

No. 471, May 7, (Gaceta Oficial No. 3117) Law of Mines. The same number of the Official Gazette contains Regulations of the Law (undated). The law consists of 89 articles divided into 10 chapters as follows: I. *Definitions.* II. *Possession of Minerals.* All mineral deposits belong to the Republic (art. 1) but mineral water, building stone, clays, salt from evaporation, limonite and in general any deposit on the surface and not reaching the subsoil rock (except precious stones, gold, platinum, tin, manganese and other metals) may be worked by the owner without a Government grant (*privilegio*) (arts. 2 & 3) III. *Mining Grants and Procedure for obtaining them.* Licenses for exploration require the consent of the owner of the land; if denied, special expropriation proceedings may be had (arts. 9, 58 seq.) after which the procedure is by staking, survey, petition and inscription (arts. 10-14). Exploration permits are in general limited to 1000 hectares and require formal contract with the landowner or expropriation proceedings, petition, notice, publication; are good for 2 years, renewable for an additional year, if no commercial values have been found; and the holder of an exploration permit obtains an exclusive right to obtain a mining title (arts. 15-26). Mining grants (*derecho minero*) are measured horizontally and comprise the subsoil vertically to infinity (art. 27; they are preferably to be rectangular (art. 28). No one may own grants (except for oil and natural gas) for more than 1,000 hectares in any one province: if acquired by inheritance or judgment in excess, they may be held for 2 years (art. 29). Grants are obtained by petition, survey, publication, oppositions and inscription (arts. 31-40). The annual tax is $3 per hectare, payable semi-annually in advance (41). Coal mines pay in addition a royalty

of 2% to 5%, quarterly (43). Special provisions govern petroleum, natural gas and hydrocarbons, the royalty, in addition to the tax of $3 per hectare being 10% to 15% (arts. 45-53). In the case of hydraulic platinum, gold or tin mines, grants may be limited to 10 hectares (55). IV. *Of rights and privileges subordinated to the possession of mines.* This chapter deals with rights of easements and servitudes, condemnation, etc.; the works authorized by this chapter are declared of public use (arts. 56-68). V. *Construction, operation and maintenance of mines.* (arts. 69-77) Government inspection is provided for. VI. *Proceedings for devolution of a mining property to the Nation.* (arts. 78-81). VII. *General Provisions.* VIII. *Penal Provisions.* IX. *Temporary Provisions.* X. *Repeals.* Existing concessions must be inscribed within 6 months and all police and tax provisions of the present law are made applicable thereto. (art. 89).

No. 475, May 17, (Gaceta Oficial No. 3118, May 22) amending Law No. 318) on Conservation & Distribution of Water in arid regions.

No. 476, May 18, (Gaceta Oficial No. 3119, May 26) amending arts. 72 & 91 of the Sanitation law (No. 338).

No. 480, May 20, (Gaceta Oficial No. 3120, May 29) Law of Eminent Domain.

No. 485, May 28, (Gaceta Oficial No. 3121, June 2) amending the Highways Law (No. 285).

No. 486, June, (Gaceta Oficial No. 3127, June 23) Law for prevention of diseases of agricultural products.

No. 496 and 513, June 22 and July 9, (Gaceta Oficial No. 3128, June 26; No. 3133, July 14) amending the Lottery Law (Nos. 420 and 466, *supra*).

No. 511, July 1, (Gaceta Oficial No. 3138, July 31) Law of Land Registry. This is a fundamental law of great importance intended to remedy the defects of the land laws and insecurity of titles, but is too long and of too highly specialized interest to reproduce or abstract in these pages. It is, in effect, a compulsory Torrens title law; setting up Land Courts for the purpose and providing for transfers of title, mortgages, etc., by means of certificates of title and inscription.

No. 519, July 26, (Gaceta Oficial No. 3139, August 4) Law against libel, defamatory anonymous letters, etc.

No. 520, July 26, (Gaceta Oficial No. 3139, August 4) Law on Associations not organized for profit. The law contains provisions both as to domestic and foreign corporations.

No. 528, August 14, (Gaceta Oficial No. 3144, August 21) amending art. 6 of the Law of Judicial Organization.

No. 545, September 20, (Gaceta Oficial No. 3154, September 25) amending Real Property Tax Law.

No. 553, October 28, (Gaceta Oficial No. 3164, October 30) amending the Law of Land Registry.

No. 563, November 20, (Gaceta Oficial No. 3172, November 27) Finance and Revenue Law (*Ley de Hacienda*). The maritime zone, tidal lands, beds of navigable rivers and other waters are placed under the jurisdiction of the Department of Hacienda, with power to lease and grant permits (art. 3). The law also regulates the offices of Treasurer and Auditor, and of the said Department.

No. 572, December 6, (Gaceta Oficial No. 3175, December 8) Law on Sedition.

No. 573, December 6, (Gaceta Oficial No. 3175, December 8) Law on Criminal Defamation of the government of the United States, the Military Government, or officials of either. Offenses are cognizable by the courts of the Military Government.

No. 575, December 9, (Gaceta Oficial No. 3176, December 11) amending art. 175 of the Penal Code (on Bribery).

No. 586, December 28, (Gaceta Oficial No. 3183, January 5, 1921) Law of Forest Reserves.

P. J. E.

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### XIII. Venezuela, 1920

June 24, Gaceta Oficial No. 14, 106 July 6. *Law of National Sanitation.*

June 26, Gaceta Oficial id. *Organic Law of the Consular Service.* Venezuelan consuls cannot, except temporarily under special permission, act as consuls for another nation (Article 7) nor, if remunerated, carry on any trade or profession in the country to which they are accredited (Article 8). Among other attributes, besides the usual ones of consuls are (Article 18): to act, when requested, as arbitrators; "to evidence the execution of powers of attorney for use before the authorities and courts of Venezuela, as well as any contracts relating to property situated in or obligations to be performed in Venezuela." (Article 55). The payment of certain consular fees is no longer made at the consulate but on arrival of the documents in Venezuela (Articles 58, 59).

June 21, Gaceta Oficial No. 14, 115, July 16. *Laws of Aviation.* (74 articles). National Sovereignty is declared over the air above the national territory and waters (Article 1); the Federal Executive is vested with the supreme right of inspection of aeronautics and air transport and is given the right to prohibit or limit flying for military reasons or public safety, and to prescribe air routes and landing stations. (Articles 3-6). Registry is required (Articles 7-9, 41 seq.) or, where dispensed with by Treaty, a navigation permit, both for airship and crew, and certificates of airworthiness (Article 14). Special authorization of the Government is required to carry mail, or wireless or topographical equipment (Articles 11, 12, 58). Landing places must be officially authorized (Articles 15, 18). Airships are prohibited from flying above towns at an altitude lower than required to land outside of town, in case of accident (Article 20). "Stunt" flying or flight at a low altitude endangering public safety is also prohibited (Article 21). The authorities and military aviators are given full right of access at all times to airships and aerodromes (Articles 24-27). The right of condemnation as a public use is given for landing places, etc., for public airlines (Article 32 seq.) Except as otherwise provided by treaty, special authorization is required for foreign airships to fly over Venezuelan territory (Article 38, 39). The Executive is authorized to reserve commercial flying between points in Venezuela to nationals, and authorization, except as otherwise provided by treaty, for aeronautical business may only be granted to foreigners under conditions of reciprocity and after registry in the Commercial Registry in Venezuela (Articles 49-51). Special requirements are prescribed for foreign airships (Article 52 seq.) Throwing articles out of airships is prohibited under penalty of fine and imprisonment, revocation of license and civil liability (Article 56). Carriage of munitions of war is absolutely prohibited (Article 58). The following rules are prescribed for civil

liability: "The following are liable jointly and severally with the person at fault for all obligations derived from aerial navigation and for all damages caused to persons or property by an airship or its operation, as also for damage caused at landing places: 1. The holder of the navigation permit issued to the airship: 2. The person in possession of the apparatus." The same liability extends to the occupants of the airship for damage to persons or property caused in the operation of the ship. The foregoing is without prejudice to the liability of the doer of the act. (Article 63). The owner of an airship and other persons liable may be required to insure or give bond or other security against such damages (Article 65). The airship and its contents also can be held liable, (Article 65), and a lien is given on the airship and its contents to the occupant of realty until damages caused thereto by the airship or its occupants have been paid (Article 66). The provisions of Venezuelan law, on the subject of obligations, relative to liability for damages, are applicable if not in contradiction to the provisions of this law (Article 67). Action may be brought, at the election of the plaintiff, at the domicile or residence of the party at fault, at the place where the damage was done, or the bond or security deposited, or at the domicile of the insurance company (Article 68). In case of crimes committed on board a foreign airship over Venezuela territory, or when the victim or the guilty party is of Venezuelan nationality and prosecution has not yet been had abroad, or the ship has, after the crime, landed in Venezuela, the Venezuelan courts have jurisdiction. They also have jurisdiction, in accordance with the laws or treaties, over infractions of the laws for public safety and of military and fiscal laws and of laws and regulations relating to aerial navigation, and of crimes committed abroad by the occupants of a Venezuelan airship when they have not been prosecuted by a foreign court. (Article 69).

June 26, Gaceta Oficial, Special Number July 29. *Law of Mines.* This is in large part the same as the former Mining Law of June 27, 1918. The principal amendments are: In lieu of Articles 3 to 6 it is provided (Article 3) that the exploitation of hydrocarbons, coal and other mineral fuels shall be governed by a special law (for such law see *infra,* law of June 30th). Marble, kaolin, porphyry and magnesite are added to the substances ownership whereof is vested in the owner of the soil (Article 6 amending Article 8 of the former law). Article 8 is new, providing that working contracts for these and other deposits, which if on privately owned lands would belong to the owner, shall not be for a longer term than ten years or embrace more than 50,000 hectares, and must be approved by Congress. The phraseology is changed throughout so as to style the rights granted a mining "title" instead of a "contract." Amendments, either of phraseology or substantive law or procedure; of minor importance or renumbering are made in Articles 2 to 10, 12, 14, 22, 27, 28 to 35, 54, 56, 58, 95, 143, 148, 156, 199, 202, 204, 205, 208, 211, 224 to 229.

June 30, Gaceta Oficial, Special Number, July 29. *Law of Hydrocarbons and other fuel minerals.*

Chapter I. Fundamental provisions.—The law governs the exploration and working of deposits of hydrocarbons, coal and other analogous mineral fuels. The term hydrocarbons comprises all subterranean formations of petroleum, asphalt, bitumen, pitch, ozokerite, fossil resins and gases from such fomentations (Article 1). The right of exploration is obtained only by permit from the Federal Executive and the right of working, except as it follows the right of exploration under Article 32 and other provisions of the law, only by contract with the Federal Executive approved by Congress: the rights of exploration, if the formalities and requirements of the law are complied with, cannot however be refused (Article 2).

The right of working does not give title in fee (Article 3). The law distinguishes between reserved zones and zones open for exploration; reserved zones, inter alia, including those in which there are already vested rights, those under navigable waters, certain zones in the discretion of the Executive. (Article 4). In the open zones exploitation contracts may only be made with the explorer or his assigns. (Article 5).

Chapter II. Exploration Rights.—Permits are limited to continuous tracts, not divided by navigable rivers, not exceeding 10,000 hectares in area, except in case of the owner of the land of a larger area. No more than six permits may be granted to any one person (Article 7). In the case of privately owned land, only the owner or his assigns may within the year following promulgation of the law obtain the permit: thereafter the permit may be granted to any individual, foreign or national (Article 8). The prescribed formalities are registration of a declaration with the Land Registrar, publication, survey, application within eight months to the Ministry of Fomento and offer to pay 25 to 75 centimes per hectare, according to the kind of mine (Articles 8-14). Opposition may be made or the Minister may of his own motion, in certain specified cases, suspend the proceedings (Articles 15-17). In case of denial or suspension, appeal may be had to the Federal Court of Cassation (Article 18). The permit, if granted, is for two years from the date of publication thereof (Article 21), and cannot be extended (Article 22). The permit is assignable upon notice to the Ministry of Fomento (Article 27). Permits may not be granted to specified government officials, nor to foreign governments (Articles 28, 29).

Chapter III. Exploitation Contracts.—Prior to the termination of the exploration permit, application may be made for an exploitation contract (Article 30). For this purpose, tracts under exploration are divided into alternate lots of 200 hectares, in the case of hydrocarbons, and 500 in the case of coal and analogous minerals and the explorer can obtain exploitation leases for half of such lots in alternate parcels, the remainder falling under the reserved zones (Article 31). The term of the contract is thirty years; the contractor has to pay within one month 2,000 Bolivars for coal and oil, etc., lots and 1,000 Bolivars per lot for other substances; and 400 to 1400 Bolivars annually per lot, depending on the nature of the deposit, and 15%, in kind or in cash at the market value, of the gross products. In special cases, notably where transportation is difficult, the royalty may be reduced to 10%, but never less than 2 Bolivars per ton of petroleum, if payment is to be made in cash (Article 32).

Special provisions are made for the reserved zones (Articles 41-48). Exploitation contracts may be assigned to foreign or national individuals or companies under prior consent of the Government, but no one person or company may acquire by assignment more than 100,000 hectares of coal or 40,000 of oil, and no assignment may be made to a foreign government or its agents (Article 49). Every leased lot must be worked within three years (Article 50). Contractors are

granted special franchises and exemptions including, inter alia, the right of condemnation, easements, exemption from customs duties and mining duties (Articles 55, 56). Among other grounds for annulling contracts (Articles 64-69) is recourse to diplomatic protection.

Chapter IV. Sundry Provisions.—Vested rights are protected, but concessionaires under prior laws may elect to come in under the present law (Articles 73-75).

July 3, Gaceta Oficial No. 14, 168, September 17, ratification of the law approving the Treaty with the United States on Commercial Travelers signed at Washington July 3, 1919. Ratifications exchanged August 18, 1920.

October 12, Gaceta Oficial No. 14,204, October 29). Ratification of the Law approving the accession of Venezuela to the League of Nations. P. J. E.

## Book Review.

*Latin American Commercial Law.*—By T. Esquival Obregón with the collaboration of Edwin M. Borchard. (New York, 1921.)

One of the serious defects which Latin-American law shares in common with many European countries is the very rigid separation of commercial law from the general body of the law that has persisted from medieval times. Lord Mansfield and other judges performed for us the invaluable work of fusing the business customs and usages that constituted the law merchant with the common law. In the civil law countries, on the other hand, by the adoption of entirely separate codes for civil and commercial law, the differentiation between the two has been accentuated. To the common lawyer of today the sharp distinction is as perplexing and unnecessary as is, to the civilian, our rapidly vanishing distinction between law and equity.

It is to "commercial" law, in the strict sense to which it is confined by the codes of Commerce, that this volume, undoubtedly the most important single contribution yet made in the United States to the comparative study of Latin-American law, is devoted. The author might perhaps have rendered a still more valuable service to the constructive development of Latin-American law had he made a fundamental analysis of the situation above mentioned and its disadvantages, but he seems to take it for granted that such a distinction is inevitable. In fact, he impliedly defends it by enunciating the theory that commerce is a quasi-public occupation and a merchant a quasi-public official. Of course, a trader's occupation is no more quasi-public than a shoeblack's or chauffeur's and certainly less so than a railroad brakeman's.

For purposes of statement of the statutory law, classification is of course necessary, but a theory of jurisprudence that applies different rules of substantive law, evidence and procedure to a contract made between merchants from those applied to an identical contract between non-traders, thus leading to endless confusion both in theory and practice, certainly seems less preferable than our ideal that the common law is a unit, a whole. With us, therefore, the term commercial law is elastic. Writing for American readers it is a pity that the author did not include some of the subjects that we usually consider under the head of commercial law instead of restricting himself so closely to the limited contents of the commercial codes. In fact, its omissions constitute the defect of the book. The result is that while to the student the book is invaluable, we fear the author has fallen short in his purpose to satisfy also a practical need of lawyers and business men. Where the commercial codes contain no express provisions one will look in vain for the answer to practical questions of daily occurrence. For instance, little light is thrown on the important problems presented by our commercial expansion today as to whether a corporation for business abroad shall be organized in the United States or in a foreign country; questions of taxation, corporate powers and limitations, bond issues, places of meetings, etc., are barely touched on; no mention is made of companies, which we would style business corporations, organized under the civil codes. There is no chapter, not even a section, on mortgages. The hard grip on practical realities characteristic, usually, of our law is absent from these codes, many of which are hopelessly antiquated, and consequently often absent from the author's pages.

Extensive bibliographies are a valuable feature of the work. The difficulties of translation have been overcome in a masterly way and the closing chapters on procedure are an able rendering of a difficult subject. In view of the many excellences of the book, the few positive defects, such as occasionally careless proofreading and failures to note amendments to the codes, can be readily pardoned.—P. J. E.

## A Tribute to Two Lawyers

At the opening of the session of the Portsmouth Conference of the International Law Association, held at Portsmouth, England, in 1920, Lord Phillimore, vice-president of the Conference, said:

"I have only one matter to allude to, which I think this audience would like me to allude to. During the last six years a number of our friends, whose names you will find recorded, several gentlemen of eminence from many countries, paid the last debt of nature. There are two whom I must be excused for specially mentioning: Lord Alverstone, as Sir Richard Webster, and then as Lord Alverstone, was one of the oldest and most faithful members of this Association. He had been in his time President, and he remained to his death our Honorary President. When his life might have been longer, it was brought to an end by his arduous and self-denying labors. The other name is that of an American friend of ours, Mr. George Whitelock, well known in his own State of Maryland, and well known to the whole bar of the United States as long the Secretary of the American Bar Association, and as such in a position of very great influence with the American bar, which he did not scruple to use in the interests of our Association, to which he was devoted. He, I think it was, who brought about the visit of our Association to the United States, a most successful visit, presided over by the late Lord Justice Kennedy; and he was in constant correspondence with me, and with the Secretaries, about matters concerning the Association. The tributes to his memory in his own country were very deep and very sincere, and I think we as an Association should be glad to add our tribute to them."

# REPORTS OF EUROPEAN LEGISLATION

## Belgium's Limited Prohibition Law and Other Statutes—Banner Law-Making Year in Scandinavian Parliaments—Swedish Law Concerning Children Born Out of Wedlock—Spanish Bibliography—Switzerland in 1920

### I. Belgium—Aug. 1, 1919 to Aug. 1, 1920

*Prohibition.*—Belgium has enacted a limited Prohibition Law. The principal attack is upon the saloon and other public places where intoxicating liquors are sold, or offered for sale, for consumption on the premises. It assumes to correct the evils incident to the consumption of alcoholic beverages without too greatly interfering with personal liberty. It divides alcoholic beverages into two classes, spiritous and fermented, each class being dealt with in a separate statute.

The Law of August 29, 1919, relating to spiritous liquors, provides that the consumption or sale of any quantity of spiritous beverages to be consumed on the premises, is prohibited in all public places such as saloons, hotels, restaurants, places of amusement, stores, boats and trains, or upon public highways (Art. 1, Sec. 1). Tradesmen, other than those who sell beverages to be consumed on the premises, are authorized to sell, or offer for sale, spiritous liquors to be consumed away from the premises, provided each sale or delivery consists of not less than two litres (Sec. 2). This provision does not apply to pharmacists whose business is regulated by other legislation.

Dispensers of beverages for consumption on the premises are prohibited from having any spiritous liquors whatsoever either on premises where beverages are consumed or at their residence (Art. 2).

The Law of August 29, 1919, relating to fermented liquors, prohibits certain classes of individuals, either as principal, or as agent or employee, from engaging in the business of selling fermented liquors. This class includes persons who have failed to pay any tax of the preceding year or the license tax of the current year; persons who have received a penal sentence or who have been convicted of certain lesser offenses involving moral turpitude; and persons who maintain an employment agency, a bureau for chartering, or for the enlistment of seamen (Art. 1, Sec. 1). The foregoing prohibitions apply to the wife and the ascendants and descendants of the foregoing classes of persons, if residing with the person of the prohibited class (Sec. 3).

Every place for the sale of fermented liquors opened prior to December 14, 1912, must have certain minimum requirements in the interest of public health, in respect of situation, area, height and ventilation of rooms, light and means of egress. The details are to be fixed by royal decree and supervision is placed in the hands of administrative authorities (Art. 2). Hotels and boarding houses are excepted from the requirements of Art. 2, provided fermented liquors are sold only at meal time with the meal (Art. 5).

The foregoing legislation has been accompanied also by a general rise in all taxes applicable both to spiritous and fermented liquors.

*Labor Legislation—White Phosphorus.*—The Law of August 30, 1919, prohibits the manufacture, sale, or keeping for sale, of matches made of white phosphorus and authorizes the government to adhere to the Convention signed at Brussels, September 26, 1906, for the suppression of the use of white phosphorus in the manufacture of matches.

*Child Welfare.*—The Law of September 5, 1919, represents a piece of well-considered legislation in behalf of child welfare. For more than thirty years, Belgium has made notable contributions to the advancement of child welfare, particularly under the leadership of M. Jules Lejune. The present law creates a national foundation for child welfare under the title. "Oeuvre Nationale de l'Enfance." This body has for its object the encouragement and development of scientific methods of hygiene for children, the encouragement and maintenance of child welfare by the allocation of subsidies or otherwise, and the administration and medical control over such foundation (Art. 2). The National Foundation is to receive funds from the budget and distribute the same through a council of not more than forty members appointed in the first instance by the king for a period of five years (Art. 4). The Foundation is to establish a nursing council in each commune to provide free medical assistance to expectant mothers and to children under three years. The nursing councils are to organize propaganda for child hygiene and perform other duties of a suitable nature to be assigned by the Foundation. The expenses of the nursing councils are to be borne proportionally, one-half by the Foundation, one-quarter by the province and one-quarter by the commune (Arts. 8-12). Committees already organized for like purpose may be accepted for this work if conforming to certain requirements fixed by law.

The Foundation is also to provide measures for the proper feeding of nursing mothers, of babies and of children of school age (Arts. 15-18).

*Modification of Contracts.*—The Law of October 11, 1919, gives power to the courts to cancel or modify contracts entered into prior to or during the war, which have only been partly performed, or the performance of which has been prevented by the war. For this purpose a proceeding may be begun before the regular tribunals, which are empowered to exercise discretion by "taking accounting of the nature of the contract, the cause of non-performance, the character of the performance already made, and the consequences of performance upon all parties" (Art. 1).

The action may be entertained even though the parties modified the original contract by consent, prior to the enactment of the present law (Art. 2). But no demand for recision will be allowed until the parties have endeavored to compromise their differences by a procedure provided by the law (Art. 3). No claim may be made more than six months after the promulgation of the present law, unless performance was due after that period.

*War Damages—Evidence.*—The Law of April 20, 1920, provides for certain modifications in respect of the procedure to be adopted by the Tribunals of War Damages (See this Journal, vol. VI, p. 316). The law varies the rules of evidence ordinarily applicable to civil cases and allows all means of proof,

even by simple presumption and by the testimony of witnesses who would otherwise be excluded for interest in the subject-matter.

*Interest Rate for War Period.*—The Law of May 28, 1920, permits the courts to reduce to three and one-half per cent, interest due for any period between August 1, 1914, and September 30, 1919, upon loans made in Belgium prior to the war, in the form of open credits, loans on pledge, warrants, or on current account, as well as upon securities affected by the moratorium. The courts are expressly authorized to make the reduction in favor of any person deprived during the war from engaging in his normal trade or profession.

Judgment interest is reduced to two and one-half per cent in civil cases and to three and one-half per cent in commercial cases, where the determination of the cause was delayed by reason of the war.

The law applies only to Belgians and to nationals of countries associated with Belgium in the war. Application for reduction of the rate of interest must have been made prior to January 1, 1921.

A. K. K.

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## II. Scandinavia—1917

As far as the number of laws passed is concerned, 1917 was the banner year of all of the Scandinavian parliaments. But of the whole crop comparatively little is, or was of permanent value and interest, and among this little, a great part is of such specific local character that it need not be mentioned in this abstract. The great bulk of the legislation was called forth by conditions arising from and out of the great war.

In themselves such laws are not of general interest; still it may be of interest to record some of them as evidence of how a general war upsets everything even in neutral countries.

The first and most conspicuous effect appears to have been, that this war waged in order "to make the world safe for democracy" destroyed democracy everywhere, not only in the belligerent, but also in the neutral countries. At least, political democracy was destroyed, and for it was substituted universal paternalism and bureaucratic almightiness. And it appears that this dropping of democracy has affected, not only the governments, but the minds of men, also. Political tolerance has disappeared, men are declared traitors on account of their opinions, and legislation is proposed (and often enacted) whereby free speech, by mouth and by pen, is prohibited and made punishable, when not agreeable to the powers that be.

It has been reported that in Bolshevik Russia they hang men for dissenting from the Bolshevik doctrine, and in the United States. in spots, the whole representative doctrine has been repudiated, legislative assemblies having undertaken to exclude duly elected members, because they had a dissenting opinion about the best form of government.

The old fatal error that men's morals may be improved by means of laws is also cropping up everywhere. Czarist Russia imposed prohibition, and since then the United States and Iceland have followed suit.

Of course, nothing as outré as this has happened, or could have happened, in the Scandinavian countries (Iceland not considered). The idea of what freedom means, "freedom for Loki as well as for Thor," has been lodged in the Norse mind for a time of which the memory of man runneth not to the contrary, and has never been eradicated, although at times kept under.

But it is bad enough as it is.

By reading through the great mass of Scandinavian legislation for the last few years, especially that of Norway and Sweden, one can not help being struck by the constant recurrence of granting of discretionary powers to the king. As all of the Scandinavian kings are constitutional monarchs, who can not do a single official act without having the countersignature of one or more members of their cabinets, and as no cabinet can survive one day after it has lost its majority in the popular branch of parliament, this means that the rights of the citizens and others have, to a great extent, been made dependent upon the whim and designs of the shifting political parties.

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### Norway

The constantly increasing rise in prices of all commodities led to the revision of almost all laws fixing the salaries of officers of the state, both clerical, civil and military; among such laws may be mentioned Laws of May 19 and July 21, 1917, increasing the salaries of the priests of the Church and of the Public School teachers, respectively.

During the war, the Scandinavian countries were overrun by spies and propagandists of all of the belligerent countries, as well as of plotters and agents (especially of Germany, and later of Russia) who tried to hatch their plots on neutral territories, or sought to have exported to their respective countries goods and merchandise, the export of which was prohibited.

As a result, a number of laws were enacted, as for instance:

Law of April 2, 1917, made it the duty of all keepers of hotels, lodging houses, boarding houses, renters of apartments, etc., to report to the police the arrival of all strangers.

Law of May 4, 1917, imposes the same duty on all owners and captains of ships (both steam and sail) as to passengers arriving in Norway.

Another law of same date makes it the duty of all foreigners arriving in Norway intending to stay more than three days, to report themselves to the police.

Law of July 13, 1917, makes it the universal duty of all persons arriving from foreign countries to have a pass, and people, not citizens of Norway, may be prohibited by the police from entering, unless they can show a previously granted permit to do so. And, after entering, the police may prohibit any such person from remaining in any particular place for more than a fixed time.

Under the 1916 legislation we mentioned that the right to the free coinage of gold had been suspended. Law of January 30, 1917, extends the period of suspension to the end of February, 1918. At the present time, the current of the gold flood has turned.

Law of May 25, 1917, authorized the minting of fractional currency from iron.

Law of December 14, 1917, authorizes the issue of notes for 2 Kr. and 1 Kr. (about 50 cents and 25 cents).

Two laws (March 23 and June 22, 1917) allow the military to be used in doing civic work for the state, when the interests of the country demand it, such work

to be carried out under military command, control and discipline.

There are a number of laws aiming at providing more food and fuel, regulating prices, fixing new taxes, keeping the mercantile fleet employed for the use of Norway, prohibiting the sale of ships or shares of ships to foreigners, further controlling and restricting the sale of wines, liquor and beer (non-intoxicating beer is 2½ per cent in Norway and not ½ of 1 per cent, but then, the sons of the vikings may have stronger stomachs).

Norway has no coal, but is blessed with innumerable water-falls. In order to obtain the necessary power for industrial purposes and for lighting of streets and houses, Laws of July 6 and September 18, 1917, were passed, whereby extensive rights of eminent domain were granted the state and some of its subdivisions.

In order to encourage the fisheries and to obtain the best results therefrom the Law of December 15, 1917, granted the State the right of eminent domain to appropriate the necessary lands on the coasts of Finmarken for the purpose of establishing dwellings, store houses and factories in connection with the fisheries carried on in adjoining waters, and the king is given the right, with the consent of the local assemblies, to extend the law to other coastal parts of the country.

The need of fats caused the passing of the Law of December 14, 1917, authorizing the Government to engage in whaling, without regard to older laws prohibiting whaling along the coasts of Norway. From later information, it would appear that this whaling business has cost Norway a huge sum of money.

The housing problem caused several very drastic laws to be passed. Law of May 25, 1917, grants to the king the right, upon application, to give municipal authorities the power to appropriate halls, lodge rooms and vacant buildings for the purpose of housing the homeless.

An Ordinance of September 8, 1917, does prohibit, not only the giving of notice of removal to tenants under ordinary leases, but makes it unlawful to evict a tenant for a fixed term, upon the expiration thereof.

An earlier law had prohibited the use of dwellings for business purposes; Ordinance of October 12, 1917, makes it unlawful to use hotels for other business.

The laws cited above are, mutatis mutandis, characteristic of the laws passed about the same problems in all of the Scandinavian countries, and it will not be necessary to make specific mention of this class of laws, when we come to Sweden, Denmark, Iceland and Finland. Many of them have expired by their own limitation, others have been repealed, and the greater part of the balance will be repealed or annulled, as soon as sane and normal conditions return, if ever such a thing shall come to pass.

### Sweden

Law of June 17, 1917, about children born out of wedlock, contains provisions regarding the name of the child, guardianship, support, right of inheritance, how paternity is to be established, etc. The parents are both bound to support the child in such proportions as their means will allow, until it has reached the age of 18 years. The father, in addition, must support or help to support the mother for six weeks prior to and for six weeks (in special cases four months) after the birth of the child. The child has no right of inheritance after the father, except in the case of so-called "engagement" children, that is, children born to parents who at the time of conception were, or between then and the birth have become, engaged to marry each other. Engagement to marry (Trolovelse, promise of fidelity) was in Denmark and Norway a semi-official act prior to 1797. Until the beginning of the 18th century, the marriage ceremony was very seldom performed among the country population of any of the Scandinavian peoples. From the time when the Roman Catholic faith held sway in Scandinavia, two ceremonies were required in order to consummate a full marriage: first "Trolovelse" and then "Vielse." The first took place in the priest's study, the fathers, the bridegroom and two vouchers appearing and certifying that the two young people had become engaged to marry each other, and that there was no legal impediment to their marriage. They then received a Trolovelse certificate from the priest, and commenced to cohabit at once. The official Trolovelse certificate taken together with "Bestigelse af Aegtesengen (mounting the wedding-bed) were popularly considered a full consummation of the marriage, and the laws of the land gradually had to acknowledge the validity of such "marriages," especially in this that the children born to "forlovede" parents were declared legitimate. It will be seen that such "trolovelser" were something in between lawful wedlock and common law marriages. When Trolovelse was abolished in Denmark and Norway, and trolovelses children declared illegitimate (unless or until the parents were actually married) the purpose was to induce and to force the country population to marry before they cohabited. But it was hard to break a thousand-year-old custom. When I was a boy, it was still considered proper form (in the parish where my father was the priest, and in most other parts of the country) to engage the priest for the performance of the marriage ceremony in the same formal manner as before, the bridegroom, fathers and the two vouchers all appearing; and this visit to the rectory was still called "Trolovelse" . . . and the young people generally commenced to cohabit at once thereafter. But, such Trolovelse was always followed by publishing of the banns and a wedding ceremony in the Church three or four weeks thereafter. The first child was often born, eight, and not nine months after the wedding.

In Denmark, this more or less official Trolovelse has now disappeared, but from the special Swedish rule abut Trolovelses children it would appear that the old conception of the necessity and validity of Trolovelse has not died out, at least not in the more remote and sparsely populated parts of Sweden.

There is no right of inheritance given as between the child and its father's relatives.

For each child born out of wedlock a guardian is appointed, whose duty it is to assist the mother and to look after the rights of the child.

When parentage is to be established in Court the rule is that, when it has been shown that the man did have connection with the mother at a time which would make it possible for him to be the father, he is adjudged to be the father. In cases where the fact of the connection is made probable but is not entirely proven, the Court may, in its discretion, make its decree contingent upon the mother taking an affirmative

oath as to its having taken place, or upon a negative oath by the man that it did not take place (in both cases, at such a time that the man might be the father.)

The law contains elaborate provisions for the collection of the alimony imposed upon the father.

Another law of June 14, 1917, introduces legal adoption as an institution of Swedish law. It is in all main respects of the same content as similar laws passed in Norway and Denmark.

Law of May 12, 1917, about eminent domain is very elaborate, but the details are probably not of great interest outside of Sweden, although the rules for how to arrive at the amount of damages are quite interesting in themselves.

As to the special war legislation, it may be said that it does not vary much from similar laws in the other Scandinavian countries, and it is not necessary to go into details. Suffice it to say that its name is legion.

A. T.

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Carcía y Hidalgo (Julián): *Transportes por ferrocarril.*—This work contains in a condensed and readily accessible form the various rules prescribed by Spanish legislation for the transport of merchandise; the obligations of consignors; and the responsibility of common carriers. It includes the Commercial Code; the Royal Decrees promulgated on this subject; the names of Spanish railways, and the lists of their officials, as well as the stations where goods can be loaded; all methodically arranged in alphabetical order. The decisions of the Supreme Court on questions of commercial law are appended. The book cannot fail to be useful to business men as well as lawyers. (*Librería de Fernando Fé,* 15 *Puerta del Sol,* Madrid. Price 3.50 *pesetas.*)

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Guillén Rodriguez de Cepeda (Antonio). *El Tribunal de Aguas de Valencia y los modernos jurados de riego.*—This work is remarkable in that therein are preserved, almost intact, the rules adopted by the Moors for the maintenance of irrigation during the era of Hispano-Arab supremacy in the Peninsula. The system they adopted was the most elaborate and complete ever devised by any people, and the fact that it has endured unaltered for centuries is conclusive evidence of its transcendent value. The canals, tunnels, reservoirs and siphons of the province of Valencia have today, notwithstanding the vast resources of modern civilization, no counterpart in the world. So substantially were they constructed, that they are as available as they were when completed, and most of them have hitherto required no repairs. The genius of that great nation, whose claim to consideration, history, influenced by religious prejudice, has generally seen fit to ignore, was never more strikingly exhibited than in the care manifested in the distribution of water, upon whose regular and uniform supply their agricultural operations, the groundwork of their prosperity, depended. The judges, selected for this purpose from the farmers themselves, hold court at the door of the Cathedral—as did their ancestors in the eleventh century before the portals of the principal mosque—to hear the complaints of those who think they are entitled to redress. The procedure is simple and informal, the decision summary, and from it there is no appeal.

The work is most interesting, not only for the lawyer, but also for the historian, as affording a glimpse of the primitive equitable jurisdiction of an age of which few memorials survive. (*Librería de Fernando Fé,* 15 *Puerta del Sol,* Madrid. Price 3.50 *pesetas.*)

Santamaría Peña (D. Federico). *Esponsales, matrimonio, divorcios y pleitos matrimoniales con arreglo al nuevo Código Canónico y á la legislación civil, para utilidad de Abogados y Sacerdotes.*—This is a treatise on the law regulating betrothals, marriage, divorce, and matrimonial actions. In Spain, still largely subject to canonical discipline, these matters are exclusively the subject of clerical investigation. Betrothals and marriages are not valid unless solemnized under the rules of the Church, and absolute divorce is not permitted except where persons within the prohibited canonical degrees have formed matrimonial connections. Designed as a manual for lawyers and priests, the work is dull; and, as might be presumed, offers nothing new to the student of legislation. Laws founded upon alleged Divine precept, and perpetuated by the material interests of the sacerdotal order, obviously admit of no radical change, or even of modification.

S. P. S.

### IV. Switzerland in 1920

The outstanding feature of the year has been the formal accession to the League of Nations on the part of the Confederation. The final result reached by popular vote on May 16 was not arrived at without long drawn out preliminary negotiations reaching from August 4, 1919, when the Federal Council issued a message recommending that Switzerland, although a permanently neutral country, join the League.

The Treaty of Peace of June 28, 1919, in Article 425, indicates and reaffirms the century-old recognition of Switzerland as a neutral state, and the Council of the League formally recognized this circumstance at its meeting in London February 13, 1920. On March 5, following, the Swiss Federal Assembly adopted a resolution recommending the country's formal accession, and, while not compelled constitutionally to do so, the Assembly determined to submit this resolution to a popular vote. There existed in the country an undoubted divergence of opinion which had become accentuated through the early attitude of the Assembly, afterwards reconsidered, recommending Swiss accession only upon ratification of the Treaty by the Great

Powers; and the failure of the United States to ratify thus became the occasion of opposition to the treaty in Switzerland. Nevertheless, the resolution to accede prepared by the Federal Council and Assembly was finally submitted in the way of an ordinary referendum vote and the resolution was accepted by the people by a 416,870 vote against 232,719 opposed, and by eleven and one-half cantons against ten and one-half opposed. The attitude of the Swiss Parliament on this occasion was a striking tribute to the reality of popular government in the Swiss Confederation. In connection with this vote it should be mentioned that a very serious agitation was instituted and is not yet settled touching a proposed incorporation with Switzerland of the adjoining Austrian District of Vorarlberg; adjoining this District, also, is the tiny principality of Liechtenstein, which found itself in a somewhat orphaned condition at the close of the war, having formerly been, while nominally independent, practically under Austrian Imperial guardianship. The Swiss Parliament determined to accede to the wishes of the principality for partial assistance and has undertaken the conduct of Liechtenstein's foreign affairs, while the principality's customs and postal service will be operated in unison with those of the Confederation.

Another highly important determination was taken by the Swiss on March 21 when an initiative measure looking to the abolition of gaming was adopted by 276,021 votes against 223,122 opposed, and by fourteen states against eight. This measure prohibits new gaming institutions, while providing for the gradual retirement of such as are now in existence. Taken in connection with the abolition of absinthe a dozen years ago; this vote will contribute much toward the future order and well-being of the country.

On the other hand a law passed by Parliament June 27, 1919, and mentioned in last year's Journal for April, at page 342, intended to reorganize the conditions of labor, over whose conduct the Government would have more direct control than heretofore, was submitted to referendum vote March 24, 1920, and was rejected, the vote for rejection being 256,401 and for acceptance 254,455, the adverse majority being 1,946 votes only in a total vote of over half a million. It is more than probable that on a subsequent occasion either this or some similar statute will, nevertheless, be accepted.

On September 6, 1920, the Federal Council announced to Parliament that it had received an initiative petition supported by over 62,000 valid signatures asking for the submission of a constitutional amendment looking to the arrest of any citizen compromising the peace of the country. Parliament is not inclined, however, to approve of this measure, considering that the existing law is quite sufficient, if properly enforced, to accomplish the end desired. Notwithstanding this attitude it is probable that the measure will be submitted to vote at an early date.

In March, 1920, the Federal Chancery also received an initiative petition supported by nearly 61,000 signatures proposing a new regulation of the highly complex subject of Swiss nationality. Properly to adjust problems sought to be solved by this measure must, however, take much time and labor.

On October 12, 1920, Parliament determined to fix the date of January 30, 1921, for a popular vote on two initiative measures touching (1) the introduction of a constitutional article doing away with the present administration of military law, and (2) modification of Article 89 of the Constitution by the addition of a clause for the compulsory submission of international treaties concluded by the Federal Council and Parliament to popular vote.

On October 31 there occurred a referendum vote on a Federal Statute passed March 6, 1920, touching the hours of work on railways and allied means of transportation, and the Statute was accepted by a vote of 369,466 as against 277,342 opposed.

A very important economic measure is now before Parliament, namely, the introduction of a system of old age and invalid insurance by way of supplement to the already existing means of social insurance heretofore mentioned in these columns, and it is also proposed to reorganize somewhat the present Federal Assurance Court so that it may hereafter consist of five judges and three alternates appointed by the Federal Assembly and with strict reference to the representation of the three national languages, French, German and Italian, every voting Swiss citizen being eligible to appointment.

On November 9, 1920, the Federal Council made its fifteenth and probably final report to the Assembly, touching the conduct of the country during and since the war, with especial reference to the maintenance of neutrality and the international aspects of administration.

Already the various organizations instituted under pressure of war necessity have been largely dissolved, thus allowing processes of government to resume their normal progress. A new system of consular administration has been enacted and put in force and the various new political subdivisions of Europe under the Peace Treaty have appointed legations at Berne, while the Swiss government has similarly created legations to represent it under the changed conditions abroad. Great Britain and France have concluded treaties with Switzerland touching aërial navigation, although the question of such navigation in Switzerland itself, which is much to the fore, is inextricably united with the questions touching automobile travel, and no definite final results have yet been reached. The entire subject is treated in an elaborate report made by the Federal Council to Parliament February 9, 1920, on the basis of an ordinance passed on the 27th of the previous month.

An interesting proposed constitutional amendment consists in the revision of Article 77 of the Federal Constitution touching the eligibility for election to the National Council of federal functionaries.

As the year closes several matters of much public interest remain unsettled, among which is an arrangement with France touching Swiss interests in France's African colonial empire; an arbitration treaty with Italy; the question of a continuation or abolition of the neutralization of Savoy; the progress of the great Swiss Penal Code, together with a Lottery Law and a revision of the present federal system of administration of the proceeds derived from the federal monopoly of alcohol; a revision of the National Banking Act, and a proposed Stamp Tax on coupons; the active participation of the Confederation in a fiduciary organization for the maintenance of the hotel industry; and this, with a modification of the present federal nationalization of railroads now in view, will doubtless keep Swiss legislators well occupied when 1921 opens.

G. E. S.

# THE PHILIPPINES

*The Fifth Philippine Legislature* opened its second regular session on October 16, 1920, the thirteenth anniversary of the opening of the first legislature by (then) Secretary Taft.

Governor General Harrison's message at the recent session covered sixteen large printed pages. Referring to unheeded recommendations in his previous message, he said:

> Within the past year two great progressive reforms have, by virtue of constitutional amendment, become the law of the land in the United States. I renew to you my recommendation that you adopt similar provisions for the Philippine Islands, namely, for the prohibition of the manufacture and sale of alcoholic stimulants, and for the extension to the women of the Philippines of equal rights with men in the matter of suffrage, a measure already approved by the Senate. These Islands have been for centuries unique among the countries of the Orient in that they have adopted almost universally the Christian religion, and one of the distinguishing figures of this religion is the high position of women; with every opportunity for education and self-dependence the women of the Philippines are certainly entitled to a recogntion of their political equality with men.

The answer to this portion of the message appeared on December 2 in the form of a public announcement that a report against the passage of a prohibition law in the Philippines had been prepared by the joint committee of the Senate and House, appointed at the last session of the Legislature.

The Governor General also made certain recommendations with a view to relieving the unfortunate situation caused by the depreciation of the Philippine peso, saying, *inter alia:*

> The paralysis existing during the last three months in the export trade of this country and the consequent disarrangement of commerce and strain upon the financial resources of the Islands points clearly to an amendment of our currency law. As this Government has had imposed upon it the duty of maintenance of the parity between the peso and dollar by the highly artificial system known as the Conant law, more ample powers must be given to the administration to deal with commercial crises, such as that through which we are now passing.

Touching upon matters of more exclusive interest to the legal profession, the Governor General said:

> In our judicial system several reforms have now become necessary:
>
> 1. A children's court should be created for the City of Manila, in line with modern principles of humanity;
>
> 2. A more simplified procedure, free of charges in all courts of jurisdiction, should be provided for small claims. The poor have not always been able to assert their rights in court with regard to small claims, owing to the burdensome, expensive and dilatory procedure;
>
> 3. The fiscal service of the provinces of Mindanao and Sulu should be provided for as in regularly organized provinces; and
>
> 4. Funds should be provided for the purchase or preparation and publication of a digest of the Philippine Supreme Court decisions, or at least for the republication of volumes of the Philippine Reports now out of print, for the necessary use of the Bench and Bar.
>
> An increase in the courts of first instance has become necessary through the vast increase in legal business of the Islands, and I request you to revise the organic act creating these courts, to furnish a larger number of judges to those localities where experience has shown that they are necessary. Especially in election cases the delays of the court of first instance are a menace to the public order and peace of mind of various communities. Additional judges would greatly relieve that situation. In this connection I urge upon you most earnestly a revision and reform of the Election Laws. Although the charges of election frauds have not been confined to any one party or to any determined locality, nor have they been proved in many cases, it is believed that the present election law, which was enacted at the beginning of your representative government, is now in many respects deficient and antiquated, and contains voids which must be filled by the necessary amendments and additions. The discretionary power of the election officers, which is now so great that it is liable to give rise to arbitrary action, must be subjected to greater regulation and a more effective control; it would be advisable to increase the penalties for offenses against the election law, and to provide for authorized watchers for each candidate at the ballot boxes. The present system permits of suspicions which, though sometimes well founded, are often enough unjust; nothing, however, could be more important to the stability of an independent government than the assurance by the citizens that the elections are honestly conducted; with this assurance would come the ready acceptance by the minority of the results of the expression of the popular will, and upon that must be based the permanence of a Democratic form of government.

The legislature has appropriated one million pesos for independence propaganda.

*Deportation of Spanish Priest.*—On January 12, Governor General Harrison, exercising the power conferred on him by a statute relating to undesirable aliens, ordered the deportation of the Reverend Demito Zambola, a Spanish cleric and curate of Corella, island and province of Bohol, on charges of carrying on propaganda against the public schools.

C. S. L.

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*(End Contributions of Section of Comparative Law)*

# NATIONAL BANKRUPTCY ACT

## Tentative Draft of Bill Amending It to Be Discussed at Public Hearing in New York in May—Committee Invites Suggestions from Those Interested

There is presented herewith a Tentative Draft of a Bill to Amend and Supplement the National Bankruptcy Act. This will be considered at a public meeting of the Committee on Commerce, Trade and Commercial Law to be held in the Assembly Room of the Merchants' Association of New York, Woolworth Building, 233 Broadway, New York City, May 3, 1921, at 2:30 o'clock p. m. All persons interested—including members of the bar and representatives of business houses and commercial organizations—are invited to be present and participate in the discussions. Those who cannot be present in person are requested to submit their views in writing.

FRANCIS B. JAMES, Chairman.

Washington, D. C., March 21, 1921.

TENTATIVE DRAFT OF A BILL TO AMEND CHAPTER NO. 541 OF THE REVISED STATUTES OF THE UNITED STATES, PASSED JULY 1, 1898, BEING AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES.

Be it enacted by the Senate and House of Representatives, of the United States of America, in Congress assembled, that Sections 29 (a), (b) subdivision one, and (d), Section 48, Section 57 (n), and Section 60 (a), be and the same are hereby amended and supplemented so as to read as follows:

Section 29 (a). A person shall be punished by imprisonment for a period not to exceed five years upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate, which came into his charge as trustee, receiver, custodian or officer of court.

Section 29 (b) subdivision one. A person shall be punished by imprisonment for a period not to exceed two years upon conviction of the offense of having knowingly or fraudulently (I) concealed any property belonging to the estate of a bankrupt.

Section 29 (d). A person shall not be prosecuted for any offense arising under this Act, unless the indictment is found or the information is filed in court within three years after the commission of the offense, except where the person is absent from the jurisdiction, in which case, the time during which the said person is so absent from the jurisdiction shall not be a part of the period of limitation prescribed herein.

Section 48, COMPENSATION OF TRUSTEES.—(a). Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him as compensation, not to exceed one per centum of the amount to be paid the creditors on such composition;

(b). In the event of an estate being administered by three trustees instead of one trustee, or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to;

(c). The court may, in its discretion, withold all compensation from any trustee who has been removed for cause;

(d). Receivers or marshals appointed pursuant to section two, subdivision three, of this act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, that in case of the confirmation of a composition such commissions shall not exceed one per centum of the amount to be paid creditors on such composition: Provided further, that when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt, as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars

or less, and one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: Provided further, that before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act; and

(e). Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six percentum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, that in case of the confirmation of a composition such commissions shall not exceed one per centum of the amount to be paid creditors on such composition: Provided further, that before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.

Section 57 (n). Claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, and then within sixty days after the rendition of such judgment: Provided, that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

Section 60 (a). A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition, and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required *or permitted*.

Section 73. That no rights, actions, prosecutions or proceedings or causes thereof, under said Act, passed July 1, 1898, and the amendments thereto, shall be affected by this Act and the same are fully preserved to all intents and purposes, as if this Act had not been passed.

Section 74. This Act shall take effect and be in force on and after the First day of January, next, after its passage.

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### Indiana Corporation Law

Indianapolis, Ind., March 1—To the Editor: The General Assembly of Indiana has just passed and the Governor has approved a law governing the organization and control of corporations for profit. The law is the outgrowth of a movement that was started in the Indiana State Bar Association in 1913. The original bill was drafted by the Association and first submitted to the legislature of 1915. It has been before each assembly since that time.

Up to the time of the passage of this law the laws of Indiana relating to ordinary manufacturing and trading corporations have been in a very confused state, and many Indiana business men have been compelled to go to other states in order to incorporate their business in such manner as to give them freedom in its conduct. This new law is probably as broad as any other corporation law in the country in the powers it grants to corporations, the only limitation being that a corporation cannot be organized to do more than one line of business and its allied and interdependent lines of business.

The law starts out with the simple provision that any lawful business which may be conducted by an individual may be conducted by a corporation organized under this act. Three or more persons may incorporate by stating the names and addresses of the incorporators, the name of the corporation, the business to be done by the corporation, the amount of capital stock, the size of the shares, the principal office where the corporation is to be located, the business to be taken over, if any, by the corporation and the value thereof, including the good will, stating the value of tangible property and the good will separately, the number of directors of the corporation and their names and the names of those who are to manage its affairs until its first annual meeting, the length of the life of the corporation not exceeding fifty years, the time and place of its first meeting and a description of its seal. The directors must be residents of the United States and one a resident of the county in which the corporation has its principal place of business. The stock may be sold at par, at less than par, or at more than par. The price at which it is to be sold is to be named in the articles of incorporation and when sold at the price named in the articles the holder cannot be held liable for any additional amount. Every corporation organized under this law will have the power to purchase, own or convey any kind of property necessary to the conduct of its business and the power to borrow money, issue promissory notes, bonds or other evidences of indebtedness and may discount the same at any rate not greater than twenty per cent. The corporation may go through a voluntary dissolution if eighty per cent of the stock outstanding shall vote for such dissolution. Ample provision is made for the protection of the rights of creditors of a dissolving corporation.

The law does not apply to building and loan associations, banks, trust companies, cemetery companies, drainage companies, forestry associations, boards of trade, bridge companies, gas, canal and water companies, sanitary companies, religious, educational and benevolent corporations, light, heat and power companies, fencing companies, gravel road companies, insurance, liability and guaranty companies, lodges and secret orders, beneficiary societies, charitable organizations, patrons of husbandry, railroad companies, navigation companies, street and interurban railroad companies, surety companies, telephone and telegraph companies, toll road and pipe line companies, as these companies in Indiana are all subject to some sort of supervision by the state. The act has no emergency clause and therefore will not go into effect until the laws are published, which will be sometime in the month of April next.—W. A. PICKENS.

# ACTIVITIES OF STATE BAR ASSOCIATIONS

*Secretaries of State Bar Associations are requested to send in news of their organizations. "News" means not only official statements of time, place and programs of regular meetings and the action there taken but also reports of other interesting activities. In brief, anything showing what the membership, committees and leaders in the State Bar Association are thinking and doing with respect to matters of professional interest. Secretaries can help to make this department one of the most interesting in the Journal. The collection of reports will enable each State Bar Association to see every month what the others are doing and to avail itself of any suggestion contained in their activities. Contributions should be mailed not later than the 25th of each month and should be addressed to the editorial office, 1612 First National Bank Building, Chicago.*

## GEORGIA

The Georgia Bar Association will hold its thirty-seventh annual meeting at Tybee Island on June 2, 3, and 4. The time and place were recently fixed by the Executive Committee of the Association at a meeting held in Atlanta.

Col. A. R. Lawton of Savannah is the president of the Association this year. The meeting will be opened by an address by Col. Lawton. The Executive Committee is now at work on the program, which will be of unusual interest. The details of it will be announced later.

Other officers of the Association are: Warren Grice, Macon, first vice-president; Z. D. Harrison, Atlanta, treasurer; Harry S. Strozier, Macon, secretary. Executive Committee: W. Carroll Latimer, Atlanta, chairman; A. W. Cozart, Columbus; D. G. Fogarty, Augusta, and Millard Reese, Brunswick.

## ILLINOIS

The annual meeting of the Illinois State Bar Association will be held at Dixon on June 9, 10 and 11, one week later than was originally planned. The change was due to the fact that the judicial election of the state is to be held on June 6, and it was thought best to defer the meeting until after this date.

## MICHIGAN

The Michigan State Bar Association will hold its annual convention at Flint on June 3 and 4. Hon. Albert J. Beveridge of Indiana will deliver an address on John Marshall and Hon. Martin W. Littleton of the New York City Bar Association will give an address on "General Criminal Practice." Other speakers of national prominence will be heard. James C. Murfin is President of the Association.

## TEXAS

The annual meeting of the Texas Bar Association will take place at San Antonio on July 4 and 5. Former President William Howard Taft will be asked to deliver an address.

Mr. Claude Pollard, President of the Association, recently criticized the lack of interest among lawyers in judicial reform measures before the State Legislature. He urged more of them to visit Austin and discuss with the legislators the proposed amendment of the judicial article of the Constitution giving broad rule-making powers to the Supreme Court.

## VIRGINIA

The Virginia State Bar Association will hold its Annual Meeting for 1921 on April 26-28 at the Monticello Hotel, Norfolk, Va.

The first afternoon and evening of the meeting will be devoted to some form of entertainment of the Association by the local Bar.

Hon. Armistead C. Gordon of Staunton will deliver the President's address, having as his subject, "Some Lawyers in Colonial Virginia."

A paper will be read by some prominent member of the State Association, and the annual address will be delivered on April 28 by ex-Senator Beveridge, of Indiana, who will have as his subject, "The Development of the American Constitution Under Marshall."

The special order for consideration and discussion at the meeting will be "The Practice of Law by Trust Companies and Other Corporations."

## WYOMING

The following officers were elected by the Wyoming State Bar Association at the meeting held in January: John W. Lacey, Cheyenne, President; C. E. Winter, Casper, First Vice-President; Charles A. Kutcher, Sheridan, Second Vice-President; Clyde M. Watts, Cheyenne, Secretary; George E. Brimmer, Rawlins, Treasurer. Executive Council: John W. Lacey, Cheyenne; A. C. Campbell, Casper; George W. Ferguson, Casper; John Stansbury, Douglas; Clyde M. Watts, Cheyenne.

### Contingent Fees in Criminal Cases

The following ruling of the Grievance Committee of the Supreme Court and Bar Association of the District of Columbia will be of general interest:

1. A contract for professional services to be rendered in securing: (a) an acquittal, (b) mitigation of a sentence, or (c) the exercise of executive clemency in a criminal case for compensation contingent upon success, is neither illegal nor unethical.

2. Where the contract with the lawyer for the payment of such contingent compensation does not specify the services to be rendered, the presumption is that such services are in all respects legitimate and proper professional services.

3. In the absence of any suggestion of duress, overpersuasion or imposition on the client, the size of the contingent fees provided for in the agreement is of no consequence.

The Code of Ethics of the American Bar Association does not deal specifically with the subject of contingent fees in criminal cases, but simply provides that "contingent fees where sanctioned by law should be under the supervision of the Court in order that clients may be protected from unjust charges."

The ruling of the Grievance Committee above set forth is important for two reasons: First, because the opinion was rendered in an actual case; and, second, because that particular Grievance Committee is an arm of the Supreme Court of the District of Columbia and not merely a committee of the Bar Association.

### *Another Record of Long Service*

Forty-nine years on the bench, forty-five years of consecutive judicial service—twenty-two of which were spent on the state's highest tribunal and eight as Chief Justice of that body—this is the record of Chief Justice Frank A. Monroe of the Louisiana Supreme Court.

It compares with that of Chief Justice Johnston of the Supreme Court of Kansas, who has served for thirty-six years on that tribunal; and with that of Justice James H. Cartwright, the twenty-fifth anniversary of whose elevation to the Illinois Supreme Court was recently the occasion for a banquet in his honor.

Judge Monroe was admitted to the Bar in New Orleans at the age of twenty-three. In 1872 he was made Judge of the Third District Court, but had served only one month when the Republicans came into control and ousted him from the position. He was re-elected to a Judgeship in 1876, and has served continuously on the bench ever since.

In 1899 he was appointed to the Supreme Court. He was also a member of the Constitutional convention of 1898. He was the first member of the Supreme Court to be elected under the new provision of the Constitution of 1898 for the election of members of that tribunal. In 1914 he succeeded Judge Breaux as Chief Justice.

Speaking of success at the Bar, he declared in a recent interview in the New Orleans *Times-Picayune* that it awaits those who are willing to work and work diligently for it. "It is surprising how many lawyers" he continued, "some of them able lawyers too, come before the Courts with their cases poorly prepared. Their briefs and arguments show that they have not probed thoroughly into the fundamental questions presented by their case."

### OFFICERS AND COMMITTEES

(Continued from page 146)

**Change of Date of Presidential Inauguration.**

WILLIAM L. PUTNAM, Boston, Massachusetts.
WILLIAM L. MARBURY, Baltimore, Maryland.
NATHAN WILLIAM MacCHESNEY, Chicago, Illinois.
JOHN B. SANBORN, Madison, Wisconsin.
WILLIAM C. KINKEAD, Cheyenne, Wyoming.

**Classification and Restatement of the Law.**

JAMES DeWITT ANDREWS, New York, New York.
ADOLPH J. RODENBECK, Rochester, New York.
ROSCOE POUND, Cambridge, Massachusetts.
HARLAN F. STONE, New York, New York.
EUGENE C. MASSIE, Richmond, Virginia.
GEORGE P. COSTIGAN, JR., Chicago, Illinois.
EDWARD Q. KEASBEY, Newark, New Jersey.
ROBERT F. BLAIR, Tulsa, Oklahoma.
GEORGE B. ROSE, Little Rock, Arkansas.

**Law of Aviation.**

CHARLES A. BOSTON, New York, New York.
ORRIN N. CARTER, Chicago, Illinois.
WILLIAM P. BYNUM, Greensboro, North Carolina.
GEORGE G. BOGERT, Ithaca, New York.
WILLIAM P. MacCRACKEN, Chicago, Illinois.

**Legal Aid.**

CHARLES E. HUGHES, New York, New York.
ERNEST L. TUSTIN, Philadelphia, Pennsylvania
REGINALD HEBER SMITH, Boston, Massachusetts.
FORREST C. DONNELL, St. Louis, Missouri.
WILLIAM R. VANCE, New Haven, Connecticut.

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## MEMBERSHIP

The Executive Committee in January approved the organization and Plan of the Membership Committee. That Committee will be composed of one member from each of the eleven membership districts into which the states and territories have been divided, together with the former Presidents of the Association, who will serve as an Advisory Committee. The organization provides for District Directors, State Directors and County Advisers, thus covering the field fully. County Advisers are entrusted with the important task of preparing a list of members of the bar in their counties who would be desirable recruits and, after the names receive the proper approval, of securing their applications. The project is important and will no doubt enlist the enthusiastic co-operation of the members of the Association.

# OFFICERS AND COMMITTEES, 1920-1921

*President*

WILLIAM A. BLOUNT.....Pensacola, Fla.

*Secretary*

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901 Maryland Trust Building

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*Assistant Secretary*

GAYLORD LEE CLARK.....Baltimore, Md.
901 Maryland Trust Building.

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CHARLES R. BROCK, Denver, Colorado.

### International Law.

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C. L. AVERY, New London, Connecticut.

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### Publications.

WILLIAM LEE RAWLS, Baltimore, Maryland.
FRANCIS RAWLE, Philadelphia, Pennsylvania.
ROBERT PENINGTON, Wilmington, Delaware.
WILLIAM BROSMITH, Hartford, Connecticut.
A. H. ROBBINS, St. Louis, Missouri.

### Noteworthy Changes in Statute Law.

THOMAS I. PARKINSON, New York, New York.
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## SPECIAL COMMITTEES 1920-1921.

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ROBERT LAMAR, Houston, Missouri.

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ERNST FREUND, Chicago, Illinois.
SAMUEL WILLISTON, Cambridge, Massachusetts.
JAMES S. SEXTON, Hazlehurst, Mississippi.
CHARLES THADDEUS TERRY, New York, N. Y.

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